No.....

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

Ex parte Equitable Trust Company of New York, Original No. 169. 2755

In the Matter of the Petition of The Equitable Trust Company of New York, as Trustee, for a Writ of Mandamus, Original No. 2757. 2756

In the Matter of the Appeal of The Equitable Trust Company from the Order Issuing the Injunction, dated February 21, 1915. 2757

Brief of Petitioners and Appellants.

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E. W. M. CUTCHEON,
JOHN F. BOWIE,
Amici Curiae.

Filed this.....day of March, 1916.

F. D. MONCKTON, Clerk.

By....., Deputy.

THE JAMES H. BARRY CO

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BRIEF OF PETITIONERS AND APPELLANTS.

SUMMARY OF QUESTIONS OF LAW.

The primary questions of law involved in these proceedings are:

(1) Can a court whose jurisdiction has been invoked for the purpose of obtaining a decree fore-

closing a mortgage, both principal and interest of the debt being due, refuse to proceed with the foreclosure suit, though all parties request a decree, until the liability of a guarantor who has undertaken to pay interest is determined?

(2) Can this Court, acting on its own motion, against the wishes of all parties, direct that the guarantor be made a party to the foreclosure proceeding, and require that the liability of the guarantor be therein ascertained prior to making a decree of foreclosure?

(3) Assuming that a chose in action forms part of the assets pledged to secure a mortgage (and this is our opponent's claim, and is not the fact), can the court whose jurisdiction is invoked solely for the purpose of foreclosure, refuse to sell the property mortgaged and pledged until its receiver has by judicial proceeding attempted to realize upon the choses in action?

STATEMENT OF FACTS.

Under date of June 23, 1905, the Denver and Rio Grande Railroad Company and the Rio Grande Western Railroad Company (since consolidated as the Denver & Rio Grande Railroad Company of Colorado and Utah, and hereafter referred to as the Denver Company), as parties of the first part; the Western Pacific Railway, as party of the second part, and the Bowling Green Trust Company, as trustee of

the First Mortgage of the Western Pacific Railway, as party of the third part, entered into two contracts, referred to for convenience as Contracts "A" and "B".

CONTRACT "A".

This Contract recites:

(a) The virtual ownership of the Western Pacific Railway by the Denver Company.

(b) The desire of the Denver Company to afford credit essential to enable the Western Pacific Company to sell its First Mortgage Bonds, and construct its road.

To accomplish this end the Denver Company covenants to purchase at 75 Second Mortgage Bonds of the Western Pacific to the principal amount of $25,000,000, if the proceeds of such sale be necessary to provide funds for the construction of the Western Pacific Railway.

This Contract has been fully performed.

CONTRACT "B".

This Contract contains substantially the same recitals as Contract "A", but the covenants were as follows:

(a) That the respective Railroads should be operated as a joint transportation system, each giving to and handling for the other all business within its power.

(b) A covenant by the Denver Company to lease equipment to the Western Pacific Company.

(c) The grant of a right to the Denver Company by which a through passenger train could be operated between Denver and San Francisco.

These provisions are termed for convenience the traffic features of Contract "B". The financial features were as follows:

(a) A covenant by the Denver Company to pay semi-annually to the trustee of the First Mortgage of the Western Pacific Company prior to the maturity of the interest coupons *a sum which, added to the moneys then in the hands of the Fiscal Agents of the Pacific Company, should equal the amount necessary to pay the coupons maturing.*

(b) A covenant by the Denver Company to pay to the trustee, prior to the maturity of each sinking fund payment to be made, *a sum which, when added to the sinking fund payments actually made by the Pacific Company, should equal the amount required by the mortgage.*

In addition to the contract of suretyship above set forth, the Contract provided for the convenient accomplishment of the same object by obligating the Denver Company to *loan* to the *Western Pacific*

Company on its unsecured promissory notes moneys sufficient, together with the earnings of that road, to pay taxes, maintenance and interest and sinking fund requirements under the First Mortgage.

The traffic rights assured to the Denver Company by the traffic features above mentioned were among the inducements which led that Company to undertake the enterprise. But as every right accorded to the Denver Company under these provisions could easily have been obtained through its stock control of the Pacific Company or by subsequent contract, it is obvious that the reason for including these provisions in the contract was that of assuring the Pacific Company bondholders an outlet for that road east of Salt Lake City. Such an outlet might be of the utmost importance to the Pacific Company. Accordingly, it was provided for in this contract. *But inasmuch as the provisions for interchange might become undesirable, Contract "B" provided that in the event of default by the Pacific Company in the payment of principal or interest, or the performance of any of the covenants of the deed of trust securing the First Mortgage Bonds, every provision of Contract "B", except the provision whereby the Denver Company assumed the obligations of suretyship so far as concerned the payment of interest and the making of sinking fund payments to the Trustee, could and should*

be terminated by the Trustee on request of the holders of two-thirds in amount of the bonds.

Sec. 14, Art. VI, Contract "B."

ESSENTIAL PROVISIONS OF CONTRACT B.

(1) ovision giv- g single ndholder ght to en- rce contract.

The Trustee covenants and agrees that it will, from time to time, upon the request of any holder or holders of bonds secured by said First Mortgage of the Pacific Company and being satisfactorily indemnified against the expense of so doing, acting either alone or with the Pacific Company, take steps to enforce by a suit or suits in equity or at law or by other proper proceedings to be prosecuted or taken in its own name or in the name of the Pacific Company, or in the name of both, all the terms and provisions of Article II hereof that require any payments to be made to the Trustee by the parties of the first part or either of them, and, upon the request of the holder or holders of twenty per cent (20%), in amount of said bonds at the time being outstanding, will likewise enforce any and all other provisions of this agreement, and likewise of all modified agreements, if any, substituted therefor, as provided in Section 14 of Article VI hereof.

Art. V.

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The amount of moneys to be paid to the Trustee by the parties of the first part, and to be applicable to the payment of such interest, as provided in Section 4 of Article II hereof, shall be equal to the difference between the amount so required, less the amount so held by the Trustee, and such sum as shall at the date of such notice actually have been paid by the Pacific Company to its fiscal agent or

fiscal agents for the purpose of making such payment of interest;

Sec. 7, Art. VI.

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4. (a) The Denver Company and the Western Company, parties of the first part aforesaid, jointly and severally covenant and agree to purchase semi-annually, beginning with the date hereof except as otherwise expressly stated, and to pay therefor, dollar for dollar in cash, at the dates and in the manner hereinafter provided, promissory notes of the Pacific Company, bearing interest at the rate of five per cent. (5%) per annum and payable upon demand, to the amount face value, by which the gross earnings and income of the Pacific Company during the preceding fiscal half year shall be insufficient to meet the sum of the following:

(1) Its operating expense, including rentals payable under leases and, particularly, any lease of terminals at Salt Lake City, also current payments upon claims for damages to persons or property, and its ordinary, including all necessary, expenses of maintenance;

(2) Its taxes, including all assessments and other governmental charges against it or that may become a lien upon any of its property;

(3) From and after the first day of September, 1908, or the earlier acquisition and completion of the Pacific Company's main line of railroad from San Francisco to Salt Lake City, all interest falling due during the then current calendar half year upon the Pacific Company's Fifty million dollars ($50,000,000), face value, of First Mortgage Five Per Cent. Thirty-Year Gold Bonds;

(4) The Pacific Company's annual contribution to the sinking fund provided for in its said First Mortgage, if the same be payable during the then current calendar half year;

(5) Any other charge or expense that it may be necessary that the Pacific Company shall pay, in order to assure the continued and efficient operation of its property and to protect unimpaired the lien and priority of its said First Mortgage;

(6) Any tax or taxes which the Pacific Company may be required by law or permitted to pay upon or deduct from the principal or interest of its said First Mortgage bonds, so that the holders of such bonds shall, under all circumstances, receive the principal and interest thereof without deduction for any tax or taxes;

(7) All interest for such current calendar half year upon all indebtedness of the Pacific Company, other than its said First Mortgage bonds.

Sec. 4, Art. II.

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Neither the Pacific Company nor any one claiming under it, save only such persons or corporations as may be entitled to receive the interest upon said First Mortgage Bonds, shall be entitled to or possess any interest in, lien upon or claim to said fund, or any part thereof.

Sub A, Sec. 4, Art. II.

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1. So far as the same lawfully may be done, the parties of the first part and each of them will give and turn over or cause to be given and turned over to the Pacific Company all such westbound traffic of every description controlled by them, or either of them, whether originating on or passing over any of their lines, or any of the lines of either of them, or otherwise so controlled, as shall be destined to any point or points upon or that can be reached with reasonable convenience

by or via any line or lines of the Pacific Company, or any part or branch thereof, whether alone or in conjunction with other lines of railway; and will cause all east-bound traffic of every description, which shall originate in territory in any way tributary to, or which with reasonable convenience may be forwarded over, any line of the Pacific Company and destined to any point or points upon, or that can be reached by or via any line or lines of the Pacific Company, whether alone or in conjunction with other lines of railway, and which is within their control, or the control of either of them, to be delivered to the Pacific Company, for transportation to as great an extent as any of its lines are available for that purpose, and that so far as practicable their lines of railway and the lines of railway of each of them shall be operated with the lines of railway of the Pacific Company as a joint transportation system for all transportation purposes.

Each of the parties of the first part will receive and promptly transport to its destination or over its line and deliver to the connecting carrier all east-bound freight routed over its line and tendered to the Western Company by the Pacific Company.

Sec. 1, Art. II.

Section 10 of Article VI provides:

Severable character of covenants.

"The refusal, neglect or other failure of the Pacific Company to perform any or all of the covenants, agreements or conditions herein contained by it to be performed shall not constitute ground for the rescission of or refusal to perform or delay in performing this contract by the parties of the first part, or either of them; but in event of any such refusal, neglect or other failure, the party or parties

of the first part aggrieved thereby may have resort to such remedy by suit for specific performance or action for damages as may be appropriate."

Section 13 of Article VI provides:

Life of obligation and provision declaring the same shall run with land.

"This agreement shall, except as hereinafter provided, continue in full force and effect, and be binding upon all the parties hereto, from the date hereof until all of said $50,000,000, face value, of First Mortgage Five Per Cent. Thirty Year Gold Bonds of the Pacific Company shall be fully paid, principal and interest, or until said bonds shall be called for redemption and provision made for payment thereof in full, principal and interest, as provided in the First Mortgage of the Pacific Company, and shall run with the railways of the said several Railway Companies, parties hereto, into whosesoever hands the same may come."

Section 14 of Article VI provides:

Covenant to survive foreclosure.

"Notwithstanding anything herein contained or anything contained in said First Mortgage of the Pacific Company, neither the obligation of the parties of the first part nor the obligation of either of them to make any of the payments provided for in paragraphs 4 and 5 of Article II of this agreement, as and at the times herein provided, shall be abrogated or in any manner modified until all of the bonds secured by the Pacific Company's First Mortgage shall be fully paid, principal and interest, or until said bonds shall be called for redemption and provision made for payment thereof in full, principal and interest, as provided for in the First Mortgage of the Pacific Company."

Right of bondholder on default to terminate all provisions except those requiring payment of interest and sinking fund to Trustee.

"In case the Pacific Company, or any of its successors or assigns, shall make default in the payment of the principal of or interest agreed to be paid upon its bonds to be issued under its said First Mortgage, according to the tenor and effect of said bonds and the interest coupons pertaining thereto, or in event of any default in the covenants or conditions of said First Mortgage whereby a right of foreclosure shall thereunder accrue to the Trustee or the holders of the bonds secured thereby, *the Trustee shall have and shall forthwith become vested with the right, upon the written request of the holders of two-thirds in amount of the bonds outstanding and secured by said mortgage executed and authenticated in the manner aforesaid, to, and upon any such request, the Trustee* SHALL TERMINATE *this agreement (save and excepting always the provisions for payments of interest, sinking fund contributions and taxes contained in paragraphs 4 and 5 of Article II hereof).*"

Section 14 continues:

Provision continuing obligation to pay interest and sinking fund to Trustee after termination of other provisions.

"but such termination of this agreement shall not be deemed to and shall not release, nor shall anything else done hereunder release, the rights of the Trustee or of the holders of the First Mortgage Bonds of the Pacific Company to the benefits of the agreements of the Railway Companies, parties of the first part, to make the payments provided for in paragraphs 4 and 5 of Article II hereof, or upon or against any fund derived or constituted as provided in any of said paragraphs. Nothing herein contained shall be taken to authorize or to result in the termination of this agreement in any event or contingency (prior to the payment or provision for payment of all of said First Mortgage Bonds, principal and interest, as aforesaid), except upon

the election of the Trustee made with the written approval of the holders of two-thirds in amount of the outstanding bonds secured by the Pacific Company's First Mortgage given and evidenced in manner and form as above provided; but, on the contrary, at all times prior to such termination thereof, whether before or after default as aforesaid, the Trustee as well as the Pacific Company, its successors and assigns, shall be entitled to specific performance of the same and of any agreement substituted therefor and to enforce the same by suits in equity or actions at law or otherwise, as may be appropriate."

The rights of the Western Pacific Company, *not those of the trustee,* were pledged under the First Mortgage of the Western Pacific Company, and this Mortgage, executed on the same day as Contracts "A" and "B," was drawn in contemplation of the execution of these agreements, and provided that the obligations of the Denver Company as surety should not be sold on foreclosure, but should survive to the Trustee. Thus the Mortgage provided for a sale of the property of the mortgagor *excepting*

Right to require payment of interest in spite of default and sale survives to Trustee.

"the right of the Trustee and of the holders of the bonds secured hereby under said agreement between The Denver and Rio Grande Railroad Company, The Rio Grande Western Railway Company, Western Pacific Railway Company and Bowling Green Trust Company, *to require said two first named companies and each of them to make any payment or payments of money to the Trustee, and to recover damages from said companies or either of them in default of any such payment or payments,* which said rights and all rights secured by

said agreement necessary for the enjoyment and enforcement of such rights shall remain in and survive to the Trustee for the benefit of the holders of the bonds secured hereby, after and despite any and every sale made by virtue of this indenture, whether under the power of sale hereby granted and conferred or pursuant to judicial proceedings."

Sec. 3, Art. V, First Mortgage.

The Mortgage further provided:

Provision for payment of moneys collected on Contract B after default or sale.

"The Trustee shall hold all moneys received by it pursuant to the provisions of said agreement between the Denver and Rio Grande Railroad Company, The Rio Grande Western Railway Company, Western Pacific Railway Company and Bowling Green Trust Company, prior to any sale of the mortgaged and pledged premises and property, whether made under the power of sale hereby granted or pursuant to judicial proceedings, in trust for, and will apply the same and cause the same to be applied, at the times and in the manner therein provided, to the uses and purposes therein prescribed with respect of such moneys; provided, however, that any moneys paid to the Trustee under the provisions of said agreement and prior to any such sale, for the benefit of the sinking fund provided for in this mortgage, shall be held, invested and disposed of in accordance with the provisions concerning the establishment, investment and disposition of the sinking fund contained in Article VIII hereof. After any sale or sales, whether under the power of sale hereby granted or pursuant to judicial proceedings, any and all moneys that may be received by the Trustee under the provisions of said agreement between The Denver and Rio Grande Railroad Company, The

Rio Grande Western Railway Company, Western Pacific Railway Company and Bowling Green Trust Company, intended to provide the Trustee with moneys wherewith to pay interest upon the bonds secured hereby, shall forthwith be applied by the Trustee to the payment pro rata of the interest upon such of the bonds secured hereby as shall then remain unpaid in whole or in part whether or not the same shall have been reduced to judgment; and any and all moneys that may be received by the Trustee, after any such sale or sales, under the provisions of said agreement intended to provide the Trustee with moneys wherewith to make payments into the sinking fund hereby established shall forthwith be applied by the Trustee to the payment pro rata of the amounts remaining due for principal and interest upon the bonds secured hereby and then unpaid in whole or in part. The amount so payable shall in each case be paid only upon presentation of the bond or bonds and coupons (in the case of coupon bonds) whereon the same is to be paid and the amount of such payment shall be endorsed thereon."

Sec. 9, Art. IV (pp. 62-1), First Mortgage.

Section 11, Art. V, of the Deed of Trust, provides:

Provision keeping alive bonds after sale for preservation of rights on Contract B.

"In case of sale of the mortgaged and pledged premises and property or any part thereof, the purchaser in settlement or payment for the property purchased shall be entitled to use and apply towards payment of the purchase price of the property purchased any bonds and any matured and unpaid interest and coupons hereby secured, by presenting such bonds and coupons (in the case of coupon bonds) so that there may be credited and endorsed or stamped as paid thereon the sums

applicable to such payment out of the net proceeds of such sale as provided in Section 10 of this article; and such purchaser shall thereupon be credited on account of the purchase price payable by him with the sums so applicable and credited on the bonds and coupons so presented. *Such bonds and coupons so presented by the purchaser shall be deemed to be paid only to the extent of the amounts so credited as paid thereon.*"

The Mortgage also contained an unusually strong clause giving to a majority of the bondholders the right to control the Trustee in the exercise of the powers conferred upon it. The majority was also accorded the right to require the Trustee to declare due the principal debt in the event that an interest default continued for the period of six months.

Section 12 of Art. V of the Mortgage provided:

Provision for majority control.

"anything in this indenture contained to the contrary notwithstanding, the holders of a majority in amount of the bonds hereby secured and outstanding shall have the right from time to time, if they so elect and manifest such election by an instrument in writing executed and delivered to the Trustee, to direct and control the method of conducting any and all proceedings for any sale of the premises and property hereby conveyed, mortgaged and pledged, or for the foreclosure of this indenture or for the appointment of a receiver or for any other action or proceeding hereunder, and for such purpose to instruct the Trustee to exercise its right of election to declare said bonds due or to waive the exercise of the same, or if exercised, to annul the same, or to institute, continue or discontinue any proceedings hereunder."

Direct guaranty endorsed on some bonds.

In addition to these provisions, and pursuant to an agreement with the underwriters, and in order to obtain a more ready market for the Western Pacific bonds, the Denver Company endorsed on any bond, when such endorsement was requested, a direct guaranty for the payment of interest. This guaranty was endorsed on bonds in the principal amount of $36,-812,000.

SUMMARY OF CONTRACTS.

As a result of these various contracts, the bondholders of the Western Pacific Company could, in event of default, adopt various courses.

If the default occurred in the payment of interest, they could:

(1) Sue the Denver Company without proceedings to foreclose, suit being based upon Contract "B."

(2) Sue to foreclose for interest without suing the Denver.

(3) They could, if they desired, adopt both courses.

If interest remained unpaid for a period of six months, they could:

(1) Declare the principal due and sue to foreclose for both principal and interest.

(2) After such foreclosure, they could prosecute an action against the Denver Company on the con-

tract of suretyship, insofar as the principal debt remained unpaid after application of the proceeds of the sale.

We desire also to emphasize at this point that there is vested in the bondholders the right to have the property of the Western Pacific sold, *and that part of this property is the traffic feature of Contract "B," assuring, as it does, an outlet to the east from Salt Lake City.*

On the other hand, it is equally the right of the bondholders, if the holders of two-thirds in principal amount see fit to sanction that course, to terminate the traffic features of Contract "B" and sell the road free and clear of all traffic rights and obligations. *These rights are a part, and a very essential part, of the security. These rights so created are not dependent on the action of the Court but arise from the instruments themselves and form inherent limitations on the subject-matter over which the jurisdiction of the Court is exercised.*

On March 1, 1915, the Western Pacific Company defaulted in payment of interest, and the Denver Company failed to perform the obligations it assumed under Contract "B." The Trustee promptly brought suit to foreclose for non-payment of interest. In this suit it prayed:

> "That a receiver may be appointed to take possession of and to operate *the properties of defendant which are subject to the lien of such First Mortgage,* and to collect and receive the tolls, earn-

ings, revenue, rents, issues, profits and other income thereof, and to apply the net income thereof to the benefit of the holders of bonds secured by such First Mortgage as provided by the terms thereof, and with such other powers and authority and limitations of power and authority as to this Honorable Court shall seem proper."

A few days thereafter an order was made appointing receivers, the terms of the order being:

"on motion of the plaintiff by Jared How, its solicitor, the defendant not objecting thereto, it is

Ordered, Adjudged and Decreed, that Warren Olney, Junior, of Berkeley, California, and Frank G. Drum, of San Francisco, California, be and they are hereby appointed joint receivers of all and singular the property of the defendant, Western Pacific Railway Company, including the railway line now being operated by said Company, and all other property, real, personal, and mixed, of whatsoever kind and description, and wherever situated, whether described in the bill of complaint or not, including all equipment, cars, and other rolling stock, machinery, tools, materials, shops, coal yards, fixtures, coal on hand and supplies now owned, held or in the possession and use of said corporation, and wherever situated and including all tracks, terminal facilities, real estate, warehouses, offices, stations, and all other buildings of every kind, owned, held, or possessed by said Company, together with all telegraph lines and the appurtenances thereto, and also all moneys, books of account, contracts of every kind, debts, things in action, bonds, stocks, securities, deeds, leases, leasehold interests, beneficial muniments of title, bills receivable, rents, and income of premises accruing

and to accrue, as well as all franchises, easements, rights and privileges of said Western Pacific Railway Company."

The Receivers were given the usual powers.

FACTS SHOWN BY THE AFFIDAVIT OF MR. CUTCHEON.

Upon May 1, 1915, the bondholders formed a Protective Committee, and June, 1915, there had been deposited under the agreement bonds in the principal amount of over $25,000,000. And with this Committee there was then, and now is, co-operating a Dutch Committee, holding $2,500,000 of bonds. The condition of the Denver Company at this time was as follows:

At the time the Denver Company undertook the construction of the Western Pacific, that road had an outstanding debt, secured by mortgage, amounting to over $80,000,000. It had since that date been called upon to purchase Second Mortgage bonds of the Western Pacific, and had paid therefor $18,750,000. It had also been called upon to perform the obligations assumed by Contract "B," and in one way and another, in responding to the obligations assumed by Contracts "A" and "B," had paid out to or on account of the Western Pacific Company about $16,408,000 in addition to the purchase price of the Second Mortgage bonds. As a result of this, and of its own necessities, its mortgage debt had increased to $43,000,000. These bonds being secured by two dif-

ferent mortgages, one the Refunding Mortgage which secured outstanding bonds in the principal amount of $33,000,000; the other the Adjustment Mortgage which secured bonds in the principal amount of $10,000,000.

Both of these Mortgages were made after the Western Pacific enterprise had been undertaken, and the Adjustment Mortgage contained a clause by which a default in the performance by the Western Pacific of its obligations under its Mortgage was a default authorizing the foreclosure of the Adjustment Mortgage itself.

In any action prosecuted to judgment by the Trustee for the Western Pacific bondholders against the Denver Company there will be presented for decision the question whether the financial provisions of Contract "B" are an equitable charge on the assets of the Denver Company superior to the lien of the adjustment and refunding bonds.

Prior to the institution of the suit to foreclose the First Mortgage of the Western Pacific Company, the financial situation of the surety of the Western Pacific was by no means all that could be desired, for the Denver was burdened with a secured debt in the principal amount of $123,000,000, and of this sum the last $10,000,000 was in default and subject to foreclosure, at the election of the bondholders. The Denver was also in need of money for betterments and capital expenditures, $25,000,000 being the amount required as estimated by competent engineers.

The net earnings of the Denver had, however, always exceeded its fixed charges, and in the year ending June 30, 1914, that road earned $1,055,000 in excess of bond interest and sinking funds. This was one of the worst years in the history of the Denver Company. In that same year the earnings of the Western Pacific Company amounted only to $321,506. So the earnings of both companies were hardly sufficient to meet one-half the interest accruing on the First Mortgage bonds of the Western Pacific Company.

At this time certain bondholders of the Western Pacific, holding bonds of the Western Pacific with the interest guaranty of the Denver Company endorsed thereon, commenced suit against the Denver Company. It was obvious that if any substantial number of these suits were commenced and pressed, the Denver would be forced to the wall, and the creditors obtaining the earliest judgments might make a slight profit, to the great cost and irreparable detriment of other bondholders.

Under these conditions the Bondholders' Committee requested the Trustee to commence an action upon Contract "B," and obtain an order enjoining the prosecution of separate suits, the object being to control the actions against the Denver, and not to permit them to be forced, to the injury of all.

See affidavit of Cutcheon, Exhibit No. 21, Application for Writ of Prohibtion.

It was then contended and has since been held that in a transitory action jurisdiction in the Northern District of California could not be obtained over the Denver Company. (See *Fry* v. *Denver Co.*, 226 Fed., 893), and a foreclosure bill ancillary to that pending in this District had been commenced in New York, and the same receivers appointed. As various citizens of New York were about to sue the Denver, the suit on Contract "B" was commenced as a dependent suit in New York, the bill being filed as a dependent bill in order to obviate objections to jurisdiction based on the fact that parties on both sides were residents of the same State.

When the fact that the dependent bill had been filed in New York came to the attention of the Court, it issued an order restraining the prosecution of that suit, even to the extent of enjoining the plaintiff from procuring an injunction against individual bondholders suing the Denver Company and requiring the plaintiff to show cause why it should not dismiss that suit or be enjoined from further proceedings in it. This it did upon its own motion. A hearing was had upon the order to show cause, and the question submitted, the restraining order being kept in force.

In December, 1915, over $37,000,000 of bonds having been deposited with the Protective Committee, the holders elected to declare due the principal of their debt secured by the First Mortgage. The earnings of the Western Pacific Company for the year 1915

had amounted to but $617,258.44. And in November 1915, the Central Trust Company of New York, as Trustee of the Second Mortgage, had filed a cross-bill in the action for the foreclosure of that Mortgage, which was then in default, there then being approximately $8,200,000 interest accumulated and unpaid thereon.

Accordingly, a supplemental and amended bill was filed, seeking foreclosure and sale for payment of principal and interest.

In December, 1915, over two-thirds of the bonds being deposited with the Protective Committee, a plan of reorganization was formulated. This plan provided for the acquisition of the property by the depositing bondholders on a prompt foreclosure sale; transfer of the property to a California corporation for the purpose of operation; and a transfer of the stock of this corporation to a holding company, the stock of which should be distributed to bondholders. Provision was made for the issuance and sale at 90 of bonds of the operating company, with a certain percentage of stock in the holding company. The present bondholders were accorded the first right to purchase bonds, those not taken by the bondholders being underwritten, the amount payable for underwriting being 2½%, or $500,000. By the Plan the rights of the depositing bondholders against the Denver Company arising under Contract "B" were transferred to the holding company, and provision made for the protection of

these rights against loss through foreclosure of the Adjustment Mortgage. Obviously no provision was made with regard to the rights of non-depositing bondholders against the Denver Company; and obviously none could be made. Any assertions that the plan affected the rights of any non-depositing bondholder against the Denver Company is made either maliciously or without understanding. And any claim that through failure to make the Trustees under the Denver mortgages parties to the suit in New York against the Denver Company is a surrender of any claim of priority over those mortgages for any lien in favor of the Western Pacific bondholders against the property of the Denver Company is absurd.

Under this plan bonds aggregating the principal amount of $43,900,000 have been deposited, and cooperating with this Reorganization Committee is a Dutch Committee, holding bonds in the principal amount of $2,500,000.

The underwriting procured pursuant to the Plan expires July 1, 1916, at which date the Syndicate expires, and as a result securities must be ready for delivery before that date if the benefits of that underwriting are to be availed of.

All parties were anxious and willing to have a decree of foreclosure made at the earliest possible date, and were proceeding to that end, when, on February 21, 1916, the Court made an order directing that the Denver & Rio Grande and Missouri Pacific Railway

be made parties to the action. This order was made by the Court on its own motion, and was as follows:

> "Let an order be entered that the said plaintiff, The Equitable Trust Company of New York, be enjoined and restrained from further proceeding with said ancillary and dependent suit in Equity, numbered E 12-287, in the United States District Court for the Southern District of New York and be enjoined and restrained from bringing any further action or proceeding involving said Contract "B" in any jurisdiction other than this Court, and from taking any other steps which may, in anywise impair or affect the obligations of said contract or any of its provisions, without first procuring the sanction of this Court; and further,
>
> That the Denver and Rio Grande Railroad Company be made a party to this action and that such proceedings may be taken as may be necessary to make the said the Denver & Rio Grande Railroad Company a party to this action, and compel it to interplead herein and to set up any and all rights it may have or claim against the defendant herein, under the mortgage or deed of trust in this action or any of the contracts pledged therein, or otherwise; and,
>
> That the Missouri Pacific Railway Company be made a party to this action and that such proceedings may be had and taken as may be necessary to make the said Missouri Pacific Railway Company a party to this action and to compel it to inter-plead herein and set up any rights it may have herein;"

At the same time the Court made an order enjoining the prosecution of the suit on Contract "B" initiated in New York.

On March 6, 1916, the first day in the General

Term beginning on that day on which a motion to set equity causes could be heard, there was presented to the Court stipulations of all parties to the suit consenting to the setting of the cause forthwith, and stipulations consenting to the entry forthwith, or at the earliest possible date, of a decree of foreclosure. Affidavits showing the urgent necessity of immediate action were read. The Court refused either to set the case or give the decree, but continued the matter one week to allow the Receivers to make a showing in opposition. The following colloquy took place between Court and counsel:

> THE COURT—The Court cannot say what its attitude would be. The order was made directing that a proper proceeding be had to bring them before this Court. Of course, they are not foreclosed from coming here and objecting to the jurisdiction of the Court. That has to be determined, too. The Court may find it has not jurisdiction; I do not think it will, but still it might. The judgment that I have formed is not infallible. If it has jurisdiction, Mr. How, I think the Court has intimated sufficiently throughout the long argument that was had, and the discussion of that order to show cause, and what it says in its opinion as well, that in its view there can be no competent marshaling or fixing of the value of this property for the purposes of sale, for the essential purpose of fixing an up-set price, without construing the extent and character of the guarantee given in that contract by the Denver & Rio Grande, because if that contract carries a right of protection to the extent that is contended on one side that it does, it might

never be necessary to sell the property of the Western Pacific. . . .

MR. PARTRIDGE—I was going to say further, your Honor, that the reason, and the only reason, why the Receivers want to be heard, or to object to the application of Mr. How here to-day, is this: That they believe that this guarantee of The Denver & Rio Grande Railroad is a mortgage upon its property, that that mortgage is prior and superior to its first and refunding Fives, and to its adjustment Sevens, and that that can be established thoroughly in this Court; in other words, that it can be established in this Court with the proper parties before it, that that lien is superior to the lien of those two interests in the amount of $43,000,000. Furthermore, if that can be established in this Court by the Receivers, or the Equitable Trust Company, that that, together with the earnings of the Western Pacific, will more than be sufficient to pay the full interest on the bonds of the Western Pacific, $50,000,000 par, and the sinking fund besides. * * * *

THE COURT—Of course, Mr. How, it cannot be decided until it is submitted, and as I suggested, I doubt if you will get any ruling upon this application until the Circuit Court of Appeals has advised this Court as to whether or not it is correct in the attitude it has taken.

MR. HOW—I think I ought to object again and protest against the Court's granting any continuance at the request of counsel or for the convenience of counsel for the Receivers.

THE COURT—The Court is doing it for its own protection and on its own motion and for its own enlightenment. It is bound to have enlightenment to enable it to see where the requested step is leading the Court insofar as the protection of the parties whose rights are involved here are con-

cerned. You will always find me ready to decide when I have the proper basis for it, but I cannot be coerced into deciding things that do not jump with my own judgment simply because of the magnitude of the interests behind them. Let the matter go over then until next Monday and I will give you until then to make such response to this application as you may be advised, and for the advice and aid of the Court, and such further showing as may be deemed necessary.

MR. HOW—I should like to take an exception to that ruling of the Court and to the failure of the Court to act promptly in the matter.

THE COURT—Yes.

There are thus presented on the proceedings before this Court three questions:

1. Had the lower Court power of its own motion to order:

That the Denver and Rio Grande Railroad Company be made a party to this action and that such proceedings may be taken as may be necessary to make the said the Denver & Rio Grande Railroad Company a party to this action, and compel it to interplead herein and to set up any and all rights it may have or claim against the defendant herein, under the mortgage or deed of trust in this action or any of the contracts pledged therein, or otherwise; and

That the Missouri Pacific Railway Company be made a party to this action and that such proceedings may be had and taken as may be necessary to make the said Missouri Pacific Railway Company a party to this action and to compel it to interplead herein and set up any rights it may have herein?

This question arises on the proceedings for prohibition.

2. Did the Court err in restraining proceedings before the United States District Court, for the Southern District of New York? This question arises on the appeal.

3. Was the action of the Court in refusing to enter a decree in accordance with the stipulations of the parties, or in the alternative, refusing to set the cause for early hearing, a refusal to exercise a jurisdiction which the parties might lawfully call upon it to exercise, or at least a plain abuse of discretion?

PART I.

THE ORDER DIRECTING THAT THE DENVER COMPANY AND THE MISSOURI PACIFIC COMPANY BE MADE PARTIES IS VOID, AND A WRIT OF PROHIBITION SHOULD ISSUE AS PRAYED.

(1) If the Order of the Court be void, Prohibition is the proper remedy.

There can be no doubt that prohibition is the proper remedy in this case, for, as said by the Supreme Court of the United States in *In Re Rice,* 155 U. S., 396:

> "Where it appears that the court whose action is sought to be prohibited has clearly no jurisdiction of the cause originally, or of some collateral matter arising therein, a party who has objected to the jurisdiction at the outset and has no other remedy is entitled to a writ of prohibition as a

matter of right. But where there is another legal remedy by appeal or otherwise, or where the question of the jurisdiction of the court is doubtful, or depends on facts which are not made matter of record, or where the application is made by a stranger, the granting or refusal of the writ is discretionary. Nor is the granting of the writ obligatory where the case has gone to sentence, and the want or jurisdiction does not appear upon the face of the proceedings. *Smith* v. *Whitney,* 116 U. S., 173; *In Re Cooper,* 143 U. S., 472, 495."

In *In re Dennett,* 215 Fed., 673, this Court has held that a lack of remedy by appeal which will justify the writ of mandamus means the lack of a remedy equal to that which may be afforded by a writ of mandamus. It is clear that an analogous rule should apply at least with equal force in the case of a writ of prohibition.

(2) The Jurisdiction of the Court over the Controversy arising on Contract B was never invoked.

In the case of *The Equitable Trust Company of New York* v. *the Western Pacific,* the bill of complaint invoked the jurisdiction of the Court for the purpose of obtaining the foreclosure of the First Mortgage on the property of the Western Pacific. The appointment of the Receiver was sought and made pending foreclosure, for the purpose of preserving the property covered by the mortgage during foreclosure.

The parties to the original bill were The Equitable Trust Company and the Western Pacific—no one else. The jurisdiction of the Court was not invoked for any purpose except foreclosure, and any judgment ren-

dered against the Denver Company upon a collateral undertaking to the plaintiff would have been void upon its face.

(3) **The Court cannot require that there be submitted to it a controversy concerning which its jurisdiction has not been invoked.**

In *Munday* v. *Vail,* 34 N. J. L., 442, the principles of law governing jurisdiction were stated as follows:

> "Jurisdiction may be defined to be the right to adjudicate concerning the subject matter in the given case. To constitute this, there are three essentials: First. The Court must have cognizance of the class of cases to which the one to be adjudged belongs. Second. The proper parties must be present. And, Third. The point decided must be, in substance and effect, within the issue. That a Court cannot go out of its appointed sphere, and that its action is void with respect to persons who are strangers to its proceedings, are propositions established by a multitude of authorities. A defect in a judgment arising from the fact that the matter decided was not embraced within the issue has not, it would seem, received much judicial consideration. And yet I cannot doubt that, upon general principles, such a defect must avoid a judgment. It is impossible to concede that, because A and B are parties to a suit, that a Court can decide any matter in which they are interested, whether such matter be involved in the pending litigation or not. Persons, by becoming suitors, do not place themselves, for all purposes, under the control of the Court, and it is only over these particular interests which they choose to draw in question, that a power of judicial decision arises. If, in an ordinary foreclosure case, a man and his wife being parties, the Court of Chancery should decree a

divorce between them, it would require no argument to convince every one that such decree, so far as it attempted to affect the matrimonial relation, was void; and yet the only infirmity in such a decree would be found, upon analysis, to arise from the circumstances that the point decided was not within the substance of the pending litigation."

In *Reynolds* v. *Stockton,* 43 N. J. Eq., 211, the facts were as follows: Certain persons engaged in litigation concerning the ownership of a fund of money. The Court decided not only the question presented by the pleadings, but rendered a personal judgment in favor of one party against another party. The personal judgment was declared void on collateral attack, the Court saying:

"The question presented by the appeal to this Court is, whether to the decree of the New York Court the conclusive force and effect of a judgment must be accorded.

That question is distinctly presented in *Munday* v. *Vail,* 34 N. J. L., 418, where it is held by the Supreme Court of this State that a decree which is entirely aside of the issue raised in the record is invalid, and will be treated as a nullity, even in a collateral proceeding.

A decree or judgment which is not appropriate to any part of the matter in controversy before the Court can have no force. The matter in controversy is that exclusively which is presented by the pleadings and the issue framed thereby.

The object of the New York suit was fully accomplished, so far as the pleadings disclosed its purpose, when the New York fund was disposed of. There was an entire absence of such specific allegations in the complaint as were necessary to

put the receiver of the New Jersey company on his defense in respect to the state of the account between that company and the Hope company.

The decree in New York, having adjudicated a matter not presented by the pleadings nor within the issue, can have no higher effect than a judgment rendered in our own courts under like conditions. Under the authority of *Munday* v. *Vail, supra*, it must be treated as a nullity."

The case went to the Supreme Court of the United States. The judgment was affirmed, and the portion of the opinion of *Munday* v. *Vail* quoted with approval, the Court saying:

"We regard the views suggested in the quotation from the opinion as correct, and as properly indicating the limits in respect to which the conclusiveness of a judgment may be invoked in a subsequent suit *inter partes*. See, also, *Unfried* v. *Heberer*, 63 Indiana, 67."

Reynolds v. *Stockton*, 140 U. S., 254.

The suit before the District Court of the United States did not invoke the jurisdiction of that Court against either the Denver Company or the Missouri Pacific, nor did it submit to the jurisdiction of the Court any question other than the right to the foreclosure of the mortgage executed by the Western Pacific Company.

The order of the Court directing that the Denver Company be made a party to the action, requires that

there be submitted to the jurisdiction of the Court a controversy concerning which its jurisdiction has not been invoked.

(4) **The Court cannot on its own motion require that parties be brought in. If indispensable parties be wanting, the Court can dismiss the bill, but with this limitation the question of parties is a matter for the parties themselves.**

If the parties directed to be brought in be indispensable to the decision of the controversy as to which the jurisdiction of the Court has been invoked, the Court can, of course, dismiss the bill unless they be made parties.

Minnesota v. *Northern Securities,* 184 U. S., 199.

This is true only if as a consequence of their absence no binding decree can be rendered dealing with the subject-matter concerning which jurisdiction is invoked.

Shields v. *Barrow,* 17 How., 130-139.

It cannot, of course, be claimed that any person other than the mortgagee and the owner of the property mortgaged are indispensable to an action of foreclosure. Holders of subsidiary liens and mortgages are proper parties, but not indispensable, and the plaintiff has the absolute right to elect whether or not they shall be made parties to the foreclosure.

In *Searles* v. *Jacksonville Railroad,* 2 Woods, 621, Fed. Cas. No. 12,586, an action was commenced to foreclose a Railroad mortgage. An attempt was made to compel the plaintiff to make the holders of certain second mortgages parties. The Court said:

> "Mr. Jackson moved that the Florida Central Railroad Company be made a party to the suit. This motion, being objected to by the counsel for the complainant, was denied; the circuit justice holding that a complainant cannot be compelled to add parties to his bill, if he choose to take the responsibility of their not being parties."

Drake v. *Goodridge,* 6 Blatch., 151; Fed. Cas. No. 4,062.

See also:

In re Printup, 6 So., 418, 419.
Lester v. *Field,* 24 Ill. App., 124.

In *Doke* v. *Williams,* 34 So., 569, the Court said:

> "In the case of *Carter* v. *Smith,* 35 Fla., 169, 17 South, 411, this Court held that 'there is no practice in equity which will authorize the Court, upon the application of a person not a party to a suit, to compel a plaintiff to make such person a co-plaintiff'; resting its decision upon *Drake* v. *Goodridge,* 6 Blatchf., 151, Fed. Cas. No. 4,062.
>
> The latter case announced the doctrine quoted, and held further that it was equally without precedent to make one a party defendant to a suit *in personam* upon his own application, following therein the prior ruling of the same Court in the case of *Coleman* v. *Martin,* 6 Blatchf., 119, Fed. Cas. No.

2,985. The same conclusion is reached in well considered opinions by Chancellor Cooper in *Stretch* v. *Stretch*, 2 Tenn., Ch. 140, and by McClellan, J., in *Ex parte Printup,* 87 Ala., 148, 6 South., 418. * * * *"

"As was said by Chancellor Cooper in *Stretch* v. *Stretch, supra,* 'To make a new defendant to a bill, claiming in a right not noticed by the bill, would throw the rules of chancery pleading into utter confusion, for it would be to try rights without any issue between the parties.' "

In *Shields* v. *Barrow,* 17 How., 145, the Court made an order directing defendants in an equity suit to file a cross-bill, bringing in new parties. The Supreme Court said:

"And it is only necessary to consider the nature of a cross-bill, to see that it cannot be made an instrument for any such end. 'A cross-bill, *ex vi terminorum,* implies a bill brought by a defendant against the plaintiff in the same suit, or against other defendants in the same suit, or against both, touching the matters in question in the original bill.' *Story's Eq. Pl.,* §389; 3 Dan. Ch. Pr., 1742." * * *

"New parties cannot be introduced into a cause by a cross-bill. If the plaintiff desires to make new parties, he amends his bill, and makes them. If the interest of the defendant requires their presence, he takes the objection of non-rejoinder, and the complainant is forced to amend, or his bill is dismissed. If, at the hearing, the Court finds that an indispensable party is not on the record, it refuses to proceed. These remedies cover the whole subject."

Even when by statute there is conferred upon the Court power to direct that parties be brought in when the parties are proper to the disposition of the issues presented by the pleading, jurisdiction over causes of action not asserted cannot be thus acquired.

In *Clay County Land Co.* v. *Alcox,* 92 N. W., 464, the Court's decision was as follows:

> "Section 5178, Gen. St. 1894, as amended by Laws 1895, c. 29, relating to bringing in of additional parties plaintiff or defendant, construed, and held that the Court is only authorized to make its order bringing in such parties when it is necessary to do so in order to secure a full determination of the controversy between the original parties tendered by the complaint, answer, or counter-claim."

In *In re Printup,* 6 So., 418, the authorities on the subject were reviewed, the Court saying:

> "In *Shields* v. *Barrow,* 17 How., 145, it is said: 'If the plaintiff desires to make new parties, he amends his bill and makes them. If the interest of the defendant requires their presence, he takes the objection of non-joinder, and the plaintiff is forced to amend or his bill is dismissed. If at the hearing the Court finds that an indispensable party is not on the record, it refuses to proceed. These remedies cover the whole subject' of the introduction of new parties into a pending case. In *Drake* v. *Goodridge,* 5 Blatchf., 151, it is said that no such practice is known in equity as making a person a defendant to a suit on his own application, or as compelling a plaintiff to join as co-plaintiff a person not a party, on the application of such person. To the same effect is the case of *Coleman* v. *Martin,* Id., 119. And these cases are referred to in

the case of *Stretch* v. *Stretch,* 2 Tenn., Ch. 140, and the principle announced in them fully indorsed. In the latter case, as in the case at bar, the subject matter of the litigation was in the hands of a receiver, who had been appointed in the suit to which the petitioners sought to be made parties. Chancellor Cooper, in delivering the opinion in that case, uses this language: 'Where there is no privity, a stranger interested in the subject matter or objects of the suit must bring forward his claim by an original bill in the nature of a supplemental bill, or in the nature of a cross-bill, as the case may be, so that those interested adversely may have process with a copy of the bill served on them, and may have an opportunity to avail themselves of the regular modes of defense to such bill;' and, even where a third person claims under or in privity with one of the parties litigant, his interest can only be brought before the Court by bill. It cannot be done by petition. *Foster* v. *Deacon,* 6 Madd.,59; *Carow* v. *Mowatt,* 1 Edw., Ch. 9. The case of *Searles* v. *Railroad Co.,* 2 Woods, 621, involved a relationship between the petitioning and litigant parties made like that existing in the facts of this case. That was a bill filed by the owners of the first mortgage bonds of a railroad to foreclose the mortgage and sell the road in payment of the bonds. The petitioner claimed to be the owner of second mortgage bonds of the defendant company, and as such desired to set up certain equities he had against the right of complainant to foreclose and apply the proceeds of foreclosure to the payment of the first mortgage bonds. The motion to be made a party was denied by Mr. Justice Bradley, and it was held that 'a complainant cannot be compelled to add parties to his bill if he choose to take the responsibility of their not being parties.' "

Applying these settled rules to the case at bar, it is quite evident that the order directing that the Denver and Missouri Pacific be brought in is not only erroneous, but void.

The Denver & Rio Grande Railroad Company was not an indispensable party; it was not even a proper party.

The only excuse found for bringing in the Denver is that the suretyship provisions of Contract "B" may be enforced against it. It cannot, of course, be claimed that a surety is a necessary party to an action to foreclose upon the security given for the debt. Indeed, it has been held that the surety is neither a necessary nor a proper party to such a proceeding. This precise question was presented to the Court of Appeals in the case of *Columbia Finance & Trust Co.* v. *Kentucky Union Railroad,* 60 Fed., 794. The facts are stated in the opinion of the Court of Appeals rendered by Judge Lurton:

> "The first error assigned is in rejecting the amended answer tendered by the Columbia Finance & Trust Company on the 20th day of December, 1892, and in proceeding with the cause without requiring the Kentucky Union Land Company to be made a party thereto. It appears from this answer that the Kentucky Union Land Company guarantied the payment of the principal and interest of the first mortgage bonds, which guaranty was indorsed thereon; that this guaranty was made under authority of the charter of the Kentucky Union Railway Company. It further appears that when the coupons of this issue of bonds

became due on January 1, 1891, the land company and the railway company jointly borrowed on their notes $60,000 from J. Kennedy Todd & Co., and with the money paid that series of coupons. The insistence of the appellant is that the Kentucky Union Land Company became by said payments entitled to a lien upon the railroad to secure the payment of this sum of $60,000, which was used for the payment of coupons, and that it was error to proceed without bringing that company before the Court, that its lien might be established and enforced.

The unquestioned general rule as to parties in chancery is that all parties who are interested in the controversy should be made parties to the cause in order that there may be an end of litigation. If the Kentucky Union Land Company, by the payment alleged to have been made by it, as guarantor, became thereby entitled to a lien upon the property of the railway company, through subrogation, then it would have been a proper party, as it would have been interested in the property proceeded against. It would, however, in no sense be an indispensable party, because it would not have been directly affected by a decree enforcing the liens held by the holders of the first and second mortgage bonds. The distinction between a person directly interested in a controversy and directly affected by the decree, and one only indirectly affected by the decree, is well stated by Mr. Justice Bradley in the case of *Williams* v. *Bankhead,* 19 Wall., 571. We do not think that the Kentucky Union Land Company was an indispensable, or even a proper, party."

It cannot be contended that by virtue of the traffic features of Contract "B," the Denver Company became either a necessary or a proper party. The traffic

rights acquired by the Western Pacific under Contract "B" were part of the security pledged. The bondholders of the Western Pacific had, by virtue of the very terms of Contract "B," the right to have the road sold with those traffic provisions in force, or by concurrent action of two-thirds in principal amount, to terminate these features. This was part of their contract and part of their security. To make the Denver a party for the purpose of cutting off any traffic rights which it might take under Contract "B," would necessarily result in the destruction of the dependent traffic rights of the Western Pacific Company, for the traffic features of the contract were mutually dependent. But, by the express provisions of Contract "B," the question of whether the road should or should not be sold with the traffic contract in force, rested with the holders of two-thirds in principal amount of the bonds, the power in trust to terminate the contract being vested in the Trustee. The traffic rights were the property of the Western Pacific Company, but subject to termination by the Trustee. The Denver Company had no right to terminate them in any event. The Denver Company was, therefore, not only not a necessary party, but not even a proper party in this aspect of the case. Certainly, it was in no sense an indispensable party, and under any circumstances the plaintiff had the right to proceed without it if it so desired.

The past advances made by the Denver Company

to the Western Pacific Company pursuant to the provisions of Contract "A" and Contract "B" were not either a legal or equitable charge upon the property of the Western Pacific Company. These advances were by the very provisions of the contracts no more than floating debt evidenced, or to be evidenced, by unsecured notes. So, in no aspect of the case was the Denver Company either a necessary or a proper party. But as it cannot even be claimed that that Company was an indispensable party, and as no party to the suit made any objection to proceeding without the presence of the Denver, the order of the Court directing that the Denver be made a party was absolutely void.

As said in *Greenleaf* v. *Queen,* 1 Peters, 138, 147:

> "It was insisted by the counsel for the appellees, in anticipation of the above objection, that the Court below would have been warranted in dismissing the bill absolutely, without requiring anything to be performed by the new trustee, in consequence of the omission of the plaintiff in that suit to make proper parties.
>
> "That a bill may be dismissed where the plaintiff, when called upon to make proper parties, refuses or is guilty of unreasonable delay in doing so, need not be questioned; but to do so without a demurrer, plea, or answer, pointing out the person or persons who the defendants insist ought to be made parties, is unprecedented."

In the absence of actual fraud the right to control the proceeding under the mortgage is vested in a majority of the bondholders, and they cannot be deprived of this right which forms part of their security.

The claim is asserted that the ordinary rules of law applicable to a case of this class do not apply, for the reason that the plaintiff is a trustee of the bond issue, and it is claimed that when the trustee of a bond issue sues to foreclose, all discretionary powers of the trustee are transferred from the trustee to the Court. This contention is an attempt to apply to foreclosure proceedings principles which apply only to suits of a very different class.

It is true that in an administration suit by a trustee against his beneficiaries, a trustee seeking the instruction of a court as to how it shall exercise its powers, cannot after *decree* exercise discretionary powers which are by the decree assumed by the court. This rule has no application to suits commenced by a trustee in execution, as distinguished from administration of the trust, and even in administration suits the rule does not apply before decree, for the trustee has full control of the action and may dismiss it.

Sellebourne v. *Newport,* 1 K. & J., 601.

The rule does not apply to a suit to collect a debt.

Neeves v. *Burrage,* 14 Q. B. R., 504.

In a suit by a trustee to foreclose a mortgage securing an issue of bonds, the conduct of the trustee is,

in the absence of any provision of the deed of trust or mortgage, controlled by a majority of the bondholders, and if, as in the case at bar, this right be expressly given by the mortgage or by the deed of trust, it constitutes a very part of the security itself, and cannot, in the absence of fraud, be wrested from the majority.

In *Shaw* v. *Railroad Co.,* 100 U. S., 605, the Court said:

> "The trustees had an undoubted right to commence these suits when they did, and it is apparent from the whole record that all their proceedings, both before and after the sale, were in the interest of their beneficiaries generally, since one hundred and eighty in number, representing in the aggregate eight million out of the eight million five hundred thousand dollars of bonds outstanding, accepted the result and exchanged their bonds for stock in the new corporation. *To allow a small minority of bondholders, representing a comparatively insignificant amount of the mortgage debt, in the absence of any pretense even of fraud or unfairness, to defeat the wishes of such an overwhelming majority of those associated with them in the benefits of their common security, would be to ignore entirely the relation which bondholders, secured by a railroad mortgage, bear to each other.* Railroad mortgages are a peculiar class of securities. The trustee represents the mortgage, and in executing his trust may exercise his own discretion within the scope of his powers. If there are differences of opinion among the bondholders as to what their interests require, it is not improper that he should be governed by the voice of the majority, acting in good faith and without collusion, if what

they ask is not inconsistent with the provisions of his trust.

In *State* v. *Brown,* 21 Atl., 374, the Supreme Court of Maryland said:

> "As to the appeal of Mr. Carter, trustee and executor, it is sufficient to say, if there is any difference of opinion among the bondholders whether their interests will be best subserved by these proceedings, the will of the majority must in this, as in other like cases, govern. The suit was brought by the trustees at the request of a majority of the bondholders, and so long as they act in good faith, and for the purpose of carrying out the trust reposed in them under the mortgage, a minority bondholder has no right to interfere with them in the discharge of their duty. *Shaw* v. *Railroad Co.,* 100 U. S., 605. A good deal was said about the veil which conceals the real motives that have prompted this litigation. Whatever they may be, we must deal with the case as it is presented by the record, and, so dealing with it, we are of opinion that the decree below must be affirmed."

In *Waldoborough* v. *Knox,* 24 Atl., 942, the Supreme Court of Maine said:

> "Such bonds are often held by a great many persons, and, when they differ as to the best mode of rendering their security available, we think it is the right of the majority in interest to determine. The Court so held in *Shaw* v. *Railroad Co.,* 100 U. S., 605. The Court there said that to allow a small minority to defeat the wishes of an overwhelming majority of those associated with them in the benefits of the common security would be to ignore entirely the relations which bondholders,

secured by a railroad mortgage, bear to each other; and that, if differences of opinion exist among them, the voice of the majority ought to govern."

Such is the law in the absence of a specific provision in the mortgage. If, however, the mortgage contain a provision on the subject, it is controlling.

In *Gates* v. *Boston & N. Y. Air-Line R. Co.,* 5 Atl., 695-701, the Supreme Court said:

"So, too, in relation to the other boldholders, it is manifest that each bondholder enters into contract relation with each and all of his co-bondholders. His right to appropriate the security in satisfaction of his bond in such lawful manner as he may choose, is modified by the same existent right in every other holder. His absolute right of control is limited, not only by the express provisions of the bond and mortgage, but also, in great measure, by the peculiar nature and character of the security. *Canada Southern R. Co.* v. *Gebhard,* 109 U. S., 534, 537; S. C., 3 Sup. Ct. Rep., 363. 'To allow a small minority of bondholders, representing a comparatively insignificant amount of the mortgage debt, in the absence of any pretense, even, of fraud or unfairness, to defeat the wishes of such an overwhelming majority of those associated with them in the benefits of their common security, would be to ignore entirely the relation which bondholders secured by a railroad mortgage bear to each other. Railroad mortgages are a peculiar class of securities. The trustee represents the mortgage, and, in executing his trust, may exercise his discretion within the scope of his powers. If there are differences of opinion among the bondholders as to what their interests require, it is not improper that he should be governed by the voice of the majority acting in good faith and without collusion,

if what they ask is not inconsistent with the provisions of his trust.' *Shaw* v. *Railroad Co.*, 100 U. S., 611, 612."

"anything in this indenture contained to the contrary notwithstanding, the holders of a majority in amount of the bonds hereby secured and outstanding shall have the right from time to time, if they so elect and manifest such election by an instrument in writing executed and delivered to the Trustee, to direct and control the method of conducting any and all proceedings for any sale of the premises and property hereby conveyed, mortgaged and pledged, or for the foreclosure of this indenture or for the appointment of a receiver or for any other action or proceeding hereunder, and for such purpose to instruct the Trustee to exercise its rights of election to declare said bonds due or to waive the exercise of the same, or if exercised, to annul the same, or to institute, continue or discontinue any proceedings hereunder."

The Fact That the Assets of the Western Pacific Railway Were in the Hands of a Receiver Affords No Basis for the Order.

Our opponents seek to justify the order on the ground that the property of the Western Pacific Railway was in the hands of a receiver.

This fact, however, is quite immaterial. The appointment of a reeciver in an action to foreclose a mortgage does not enlarge the issues or the jurisdiction of the Court as between the parties to the action.

As stated at the outset, Contract B contained three sets of covenants:

1. The covenant to pay to the trustee the difference

between the amount of interest due and the amount of interest paid by the Western Pacific Railway.

This covenant vested no property right in the Western Pacific. It was not pledged, for it did not belong to or run in favor of the Western Pacific, and only the rights of the Western Pacific were pledged. Moreover, by the terms of the mortgage it was expressly excluded from its operation.

Sec. 3, Art. V, Mortgage.

By the express terms of the contract it survived foreclosure sale and could not be sold.

The receiver did not take posesssion of any right under the covenant and the order appointing him could not have vested in him any right thereto.

Staples v. *May,* 87 Cal., 178.

2. The covenants in relation to traffic rights.

These covenants are assets of the Western Pacific Railway Company and must be sold with the property unless the bondholders elect to terminate them; the right to terminate these and all other provisions of the contract, except the covenant to pay to the trustee, being vested in two-thirds of the bondholders by the contract itself. *Yet the exercise of this right is now forbidden by injunction.*

3. The covenant to loan to the Western Pacific Railway a sum which when added to its other revenues

would be sufficient to pay taxes, maintenance, interest on first mortgage and sinking fund.

This covenant was an asset of the Western Pacific, but it did not give to that corporation any right to the possession of moneys essential to the payment of interest or sinking fund, for these payments were to be made to the trustee.

This covenant did not survive foreclosure and in all human probability could not be enforced by receivers who were not applying the earnings of the road to the payment of interest.

Its existence is, however, the sole ground for enjoining the trustee for the bondholders from prosecuting this action on the covenant running to the trustee alone.

It is asserted that the existence of this covenant forms a ground for directing that new parties be brought into this litigation and the entry of a decree delayed.

Assuming that this covenant survived and could be enforced by the receivers, it could not be enforced in this action but only in a suit by the receivers on the covenant. But the existence of such a right of action by the receivers was not a matter to be asserted in the suit to foreclose; *nor would the existence of a pending action to enforce this contract be a ground for refusing a decree in this suit.* Both *principal and interest of the bonds are due and the existence in the hands of the debtor of a contractual right to borrow money sufficient to pay interest, obviously cannot suspend the right*

of the creditor to have the pledged assets appropriated to the payment of principal and interest.

In addition to this, the very existence of this covenant was subject to the will of the holders of two-thirds in amount of bonds. The right to terminate the covenant being vested in the bondholders themselves, it follows as a necessary incident that no rights under this covenant could be asserted after default against the will of the holders of two-thirds in principal amount of bonds.

We submit that the Writ of Prohibition should issue as prayed.

PART II.

THE COURT ERRED IN ENJOINING THE PROSECUTION OF THE DEPENDENT BILL IN NEW YORK.

The Maintenance of the Action in New York is not an Interference with the rights of the Receivers and does not constitute a Contempt.

(a) The provisions of Contract "B," by which the Denver Company made itself surety to the Trustee for the obligations of the Pacific Company as to interest and sinking fund payments, are not in any sense assets of the Pacific Company.

> *Jones on Corp. Bonds and Mortgages,* §274a (3rd Ed.).

In *Winthrop Nat. Bank* v. *Minneapolis, etc. Co.,* 77 Minn., 329, 79 N. W., 1010, the Court said:

"It is impossible to conceive how the right of the bondholders to pursue the living guarantor, or the representatives of the estate of the one who is dead, upon their contract of guaranty, or the other right as against the property mortgaged by these guarantors, can be regarded as assets, legal or equitable, of the defendant corporation, which must be resorted to or exhausted before judgment as demanded and ordered can be entered in this action. Langdon and Hinkle became personal sureties in behalf of the corporation, and also sureties, as mortgagors of their property; and the liability which they incurred as such sureties is not an asset of their principal."

(b) The right asserted by the Trustee in the dependent bill is not a right to property, to the possession of which the Receivers are entitled, for Contract "B" expressly provides that the Pacific Company shall have no right to the money to the payment of which the Trustee is entitled.

"Neither the Pacific Company nor anyone claiming under it, save only such persons or corporations as may be entitled to receive the interest upon said First Mortgage Bonds, shall be entitled to or possess any interest in, lien upon or claims to said fund, or any part thereof."

Sec. 4 (d), Art. II (p. 12), Contract "B."

The right asserted against the Denver Company by the trustee is neither a property right of the corporation whose assets are in the hands of the Receivers nor is it a right to property, to the possession of which the Receivers are entitled.

(c) The fact that the right asserted is found in a written instrument to which the Pacific Company and the Denver Company and the Trustee are all parties, does not affect the question, as the provisions sued on are separate, severable, independent provisions operating between the Denver Company and the Trustee alone. The contract itself expressly declares this to be the case.

Sec. 4 (a), (e), Art. II, Contract "B";
Sec. 10, Art. VI, Contract "B."

Indeed, the provisions sued on survive and endure after the property of the Pacific Company has been sold and every other provision of Contract "B" abrogated.

Sec. 14, Art. VI, Contract "B";
Sec. 3, Art. V, Contract "A";
Sec. 9, Art. IV, Contract "A."

(d) If the Trustee had loaned at interest part of the sinking fund which had already been paid to it, undoubtedly it could sue to recover the same, without leave of the Court; and its right to sue to recover interest and sinking fund payments not paid, without such leave, is equally clear. In so doing, it does not seek to recover property, to the possession of which the Receivers are entitled.

The obligation runs directly to the Trustee, and even if its rights are those only of a pledgee, the

powers of a pledgee in possession are not suspended by a receivership; indeed, property in pledge can be sold without leave of Court.

Fidelity Ins. Co. v. *Roanoke Iron Co.*, 81 Fed., 439, 445;
Guaranty Trust Co. v. *Galveston City R. R.*, 877 Id., 813.

Indeed it is well settled that the holder of a power of sale over mortgaged property can exercise that power after the initiation by him of foreclosure proceedings and during the pendency thereof.

Mayall v. *Eppinger*, 127 Cal., 5;
Brisbane v. *Stoughton*, 17 Ohio, 482.

So even if the object of making the direct covenant with the Trustee was merely that of vesting the legal right to the chose in action in the Trustee, that has been done; and that legal right can be exercised by the Trustee even if the Trustee be regarded as a mere pledgee.

(e) The right of the Trustee to recover on the contract of suretyship is not the same as that of the Pacific Company on the agreement to loan. The obligation to buy notes of the Pacific Company is measured by the difference between gross earnings and the amount required. The obligation to pay to the Trustee is measured by the difference between the amount actually appropriated and paid and the amount due.

Sec. 7, Art. VI, Contract "B";
Sec. 4 (a), Art. II, Contract "B."

(f) The Receivers of the Pacific Company are not entitled to the possession of the moneys provided to be paid by the Denver Company to the Trustee, even if the right to have these moneys paid be one which they can enforce. This specific property is not receivable by the Company and a suit to recover the same does not constitute an interference with the rights of the Receivers for this reason, if for no other, and, therefore, cannot be enjoined.

Re West Lancashire R. R., 63 Law Times, 56.

The fact that the Pacific Company is Named as a Party defendant in the Action in New York merely for the Purpose of an accounting is not a ground for the Issuance of an Injunction forbidding the prosecution of a suit by the Equitable Trust Company against the Denver Company to recover interest and sinking fund payments on Contract "B."

(a) The fact that the property of the Pacific Company is in the hands of Receivers appointed pending foreclosure does not prevent that corporation being made a party to an action in which no judgment for property in the hands of the Receivers is sought.

Decker v. *Gardner,* 124 N. Y., 334.

(b) Where a cause of action arises on contract prior to the appointment of receivers, it seems the receivers

are neither necessary nor proper parties, unless the contract be affirmed.

Northern Pacific R. Co. v. *Heflin,* 83 Fed., 93.

(c) Corporate existence is neither destroyed nor suspended by the appointment of a receiver in an action to foreclose a mortgage; and if no execution against property in the hands of the receiver is sought, the corporation may be made a party for purposes of an accounting in an action in which a third person's liability depends on the condition of the accounts between the corporation and that person.

Re West Lancashire R. R., 63 Law Times, 56.

(d) Even if the Pacific Company cannot be sued without leave of Court, the action may be continued against the Denver Company; and the question of whether or not the action shall be so continued is a question for the New York Court.

Patterson v. *Stewart,* 41 Minn., 84, 16 Am. St. Rep., 671.

The commencement of the action to foreclose the Pacific Company mortgage did not deprive the Equitable Trust Company or the bondholders of the right to control proceedings against the Denver Company on the contract of suretyship.

(a) The Denver Company is not a party to the action pending in the District Court, and the rights of the Trustee and bondholders against the Denver

Company have not been submitted to that Court for adjudication.

(b) Any judgment which that Court might render against the Denver Company and in favor of the Equitable Trust Company would be void on its face.

(c) Contract "B" gives complete control over proceedings against the Denver Company upon its obligations as surety to the bondholders.

(d) If the bondholders see fit to direct the Trustee to obtain judgment against the Denver Company before or after obtaining judgment of foreclosure against the Pacific Company, they have the right to do so. This right is expressly accorded them by Contract "B."

(e) Equity rule No. 42 accords to plaintiff the absolute right to proceed against the Pacific Company and the Denver Company separately. This rule is binding on this Court, and the Equitable Trust Company cannot be deprived of the rights accorded by it.

> "In all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the Court as parties to a suit concerning such demand all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable."
>
> Rule 42 of Rules of Practice for the Courts of Equity of the U. S.

(f) Where separate causes of action exist, the initiation of a proceeding on one of the causes of action does not confer jurisdiction over the other. If the second cause of action be initiated in a court of concurrent jurisdiction, the court in which the first cause of action has been initiated may continue the case pending before it if it believes the cause of action pending before it should only be determined after the second cause of action has been passed upon. It cannot, however, deprive the court which first obtained jurisdiction of that cause of the right of proceeding; nor can it enjoin the plaintiff from proceeding in a court of concurrent jurisdiction for relief not sought in the first action.

In *Buck* v. *Colbath,* 3 Wall., 334, the Court said:

> "Seizing upon some remarks in the opinion of the Court in the case of *Freeman* v. *Howe,* not necessary to the decision of that case, to the effect that the Court first obtaining jurisdiction of a cause has a right to decide every issue arising in the progress of the cause, and that the Federal Court could not permit the State Court to withdraw from the former the decision of such issues, the counsel for plaintiff in error insists that the present case comes within the principle of those remarks.
>
> " * * * But it is not true that a Court, having obtained jurisdiction of a subject matter of a suit, and of parties before it, thereby excludes all other Courts from the right to adjudicate upon other matters having a very close connection with those before the first Court, and, in some instances, re-

quiring the decision of the same questions exactly.

"In examining into the exclusive character of the jurisdiction of such cases, we must have regard to the nature of the remedies, the character of the relief sought, and the identity of the parties in the different suits. For example, a party having notes secured by a mortgage on real estate, may, unless restrained by statute, sue in a court of chancery to foreclose his mortgage, and in a court of law to recover a judgment on his notes, and in another court of law in an action of ejectment to get possession of the land. Here in all the suits the only question at issue may be the existence of the debt mentioned in the notes and mortgage; but as the relief sought is different, and the mode of proceeding is different, the jurisdiction of neither Court is affected by the proceeding in the other. And this is true, notwithstanding the common object of all the suits may be the collection of the debt. The true effect of the rule in these cases is, that the court of chancery cannot render a judgment for the debt, nor judgment of ejectment, but can only proceed in its own mode, to foreclose the equity of redemption by sale or otherwise. The first court of law cannot foreclose or give a judgment of ejectment, but can render a judgment for the payment of the debt; and the third court can give the relief by ejectment, but neither of the others. And the judgment by each court in the matter properly before it is binding and conclusive on all the other courts. This is the illustration of the rule where the parties are the same in all three of the courts."

The lower Court acquired jurisdiction only of the controversy presented by the pleadings as they stand.

Watson v. *Jones,* 13 Wall., 679, 716-17.

See also:

Nelson v. *Camp,* 191 Fed., 712;
Mercantile Trust Co. v. *Lemoille, etc. R. R. Co.,* 16 Blatchf., 324.

The District Court has no power to interfere with the proceeding pending in New York.

The pending suit in the District Court of the United States for the Southern District of New York was instituted by the filing by The Equitable Trust Company of New York of its bill against The Denver & Rio Grande Railroad Company, which is a corporation formed by the consolidation of the Denver Company and the Western Company, parties of the first part to Contract B. The bill prays that the amount due under Contract B. from the defendant to the plaintiff, as Trustee for the holders of bonds secured by the First Mortgage of the Western Pacific Company, be determined, that it be adjudged to be a charge upon the property of the defendant, and that the charge be enforced by foreclosure.

The form of the bill in that suit was evidently governed to some extent, if not chiefly, by the urgent necessity that individual holders of bonds secured by the Western Pacific Company's First Mortgage who had instituted or were threatening to institute actions in their own behalf for the recovery from the Denver & Rio Grande Company of their proportionate shares of the amount of its liability under Contract B., should

be restrained from prosecuting such actions, to the end that the liability of the Denver & Rio Grande Company should be enforced for the equal and proportionate benefit of all the bondholders according to the terms of the contract.

The suit was instituted by the plaintiff as Trustee for the bondholders, and in its own name and right and for its own benefit as such. It could not have been successfully instituted in the name of or for the benefit of the Western Pacific Company, because the money sought to be recovered was provided in the contract, which is the subject matter of the suit, to be paid to the Trustee; and the right to receive it was expressly given to the Trustee by the obligor in the contract. It is contended, however, that because Contract B. provides generally that actions for the enforcement of the covenants in the contract may be brought by the Pacific Company as well as the Trustee, that provision applies to the covenant upon which this suit was brought; and the Pacific Company had, and the receivers in its stead have, a right of action upon it.

If it were true that the receivers have a right of action against the Denver Company upon this liability, the only form of action open to them would be, of course, an action in equity for specific performance of the contract to pay money to the Trustee; because it is the Trustee alone which is entitled to receive it. But it is clear that the Pacific Company could not

prevail in an action for specific performance, because it is itself in default in the performance of its covenants contained in the contract. We do not leave out of consideration the provision in the contract that the refusal or failure for other reasons of the Pacific Company to perform its covenants shall not constitute ground for refusal of the Denver Company and the Western Company to perform theirs. But we submit that that provision would not compel a court of equity to decree specific performance of the covenants of the Denver Company and the Western Company at the suit of the Pacific Company. Specific performance is not a matter of right. Granting it is in the sound discretion of a court of equity. It is fundamental and jurisdictional that it will not be awarded unless the plaintiff is ready and willing to perform; and it will not even then be awarded if it will result in severe hardship.

It must be clear that the provision that the Denver Company and the Western Company must perform their covenants in any event was placed in the contract for the protection of the Trustee only, and not for the benefit of the Pacific Company. If it were not there, the contract would be worthless to the bondholders. The members of the railway family could agree to violate it reciprocally as they pleased.

We think, then, that the realizing against the Denver Company is in jeopardy if the Trustee be enjoined in this court from prosecuting its action. We think

that it is not only the proper party to sue, but, as well, the only party which can sue on the claim. If this court shall prevent its doing so, it will deprive it of a substantial and valuable property right without due process of law; and its action will be void.

With regard to the contention that the suit should have been brought in this court instead of in the New York court, we protest again that there has been no disposition to evade this court. No idea of proceeding in this court was ever entertained, before the suit was brought. The Denver Company has no property in this district and it is at least doubtful whether jurisdiction over its person could be had here without its consent. Be that as it may, this court would certainly not have power to enforce by foreclosure a charge against its property. Upon no consideration, therefore, would suit in this court have been advisable.

Prior to the institution in the New York court of the suit of The Equitable Trust Company against the Denver and Rio Grande Railroad Company, the receivers appointed in this suit in California, had presented to this court their petition asking that they be allowed six months from the date of the petition within which to present to this court all matters connected with certain specified contracts, including Contract B., between the Western Pacific Company and the Denver & Rio Grande Company; and that, in the meantime, they "be authorized and directed to continue the operation of said railroad" (the

Western Pacific) "under said contracts without prejudice, however, to any rights arising or accruing therefrom." It may be observed in passing that this petition made no reference to the rights of The Equitable Trust Company against the Denver and Rio Grande Company arising out of the agreement of suretyship in Contract B.

The committee of holders of bonds of the Western Pacific Company, representing nearly forty-one millions of dollars face value of such bonds, had requested The Equitable Trust Company, as trustee for the bondholders, to enforce the liability of the Denver and Rio Grande Company under its agreement of suretyship contained in Contract B.; and the suit in New York was instituted in compliance with that request and in performance of the duty to that end imposed upon the trustee by the terms of that contract.

Counsel for The Equitable Trust Company residing in California knew of the filing of this petition, but did not know that the suit in New York was impending. Counsel for The Equitable Trust Company residing in New York did not know, when the bill in the New York suit was filed, that this petition had been presented to this court or that any such petition was contemplated; nor did any member of the committee of bondholders who requested that the suit be begun, so far as we have been advised. It seems impossible, then, to predicate, upon the fact that the New York suit was instituted after this pe-

tition was filed, or upon any other aspect of the matter, any suspicion that the action of any of those who were responsible for the institution of the suit in New York was instigated, or precipitated as to time, by the desire to evade the jurisdiction of this court or to trespass to any extent upon its prerogatives; but, nevertheless, we wish again to protest that no such desire was ever entertained in the matter, much less acted upon.

PART III.

THE ACTION OF THE COURT IN REFUSING TO ENTER A DECREE IN ACCORDANCE WITH THE STIPULATIONS OF THE PARTIES, OR, IN THE ALTERNATIVE, REFUSING TO SET THE CAUSE FOR HEARING, WAS A PLAIN ABUSE OF DISCRETION.

It is well settled that this Court has jurisdiction to issue a Writ of Mandamus, directing the lower Court to hear and determine a cause pending before it, when that Court refuses so to do on account of reasons insufficient in law.

Barber Asphalt Co. v. *Morris,* 132 Fed., 945;
McClelland v. *Carland,* 217 U. S., 268.

On mandamus the Court is not confined to questions of jurisdiction, as is the case on prohibition. If, therefore, the refusal of the Court to decide the cause after all parties had consented to a decision was plainly erroneous, that error can be corrected on mandate.

Horsburgh v. *Murasky,* 169 Cal., 500.

There can be no doubt that the action of the Court in refusing a decree was erroneous. Even if the Court were correct in ordering that the Denver Company be made a party (which it was not), that was no ground for refusing to proceed and foreclose. The guaranty of the Denver ran only to interest and sinking fund, and as the principal of the bonded debt was due, it was absurd to postpone foreclosure sale in order to determine whether the interest and sinking fund guaranteed could be collected.

The sinking fund was but $50,000 per year, and it would require approximately 1,000 years for these payments to equal the amount of principal due and payable forthwith.

The claim that one holding a debt secured by mortgage could not collect by foreclosure the principal of the debt then due, merely because it might be possible to collect interest from one who had guaranteed payment of interest, is absurd.

On hearing of the motion to set, the following dialogue took place:

> THE COURT—That does not answer the question. The question is what are the rights of the bondholders of the Western Pacific under that contract; and if they are such as are seriously claimed for them, counsel can readily perceive that if the Denver & Rio Grande can be held responsible, and is able to respond, there would be nothing left here as requiring a sale of the physical properties of this road to meet those obligations.
>
> MR. HOW—I should not off-hand, your Honor,

be of the opinion, nor should I be willing to assent to the proposition, that a right to foreclose a mortgage is gone merely because a surety upon a debt secured by the mortgage is good. I think the right to foreclose the mortgage is an independent right.

THE COURT—I am not saying that that is not true; what I am saying is that it might readily be found that it would not be necessary to sell this property. It does not follow necessarily that it would not. I am not prepared to say that it would not. But, certainly, in proceeding to determine the up-set price—in providing a decree for the sale of this property an up-set price for the disposition of this property under a sale—the Court would have to be afforded, it seems to me, the information which would come as a result of determining the character and the extent of that security afforded by the provisions of Contract B.

MR. HOW—In that position, your Honor, I will say that my associates and apparently all parties to the action disagree in your Honor's statement of the law.

This dialogue shows that the Court was either ignorant of the character of the proceeding before it, or was acting on some legal theory unknown in the jurisprudence of this country.

In view of the facts disclosed by the affidavits, the refusal of the Court to set the cause or make the decree, coupled with its declared intent to postpone a decision on the motion till after a decision by this Court, was in effect a denial of the motion.

The Claim Asserted by the Petitioners in Intervention That No Decree Should Be Entered Because the Obligations of the Denver Company Under Contract B are Secured by an Equitable Charge on the Properties of the Denver Company, Affords No Basis for Refusing a Prompt Decree.

We have already shown that the existence of the collateral obligation of the Denver Company to pay interest and sinking fund gives no excuse for refusing a prompt decree.

It is, however, asserted that this obligation is secured by an equitable charge upon the properties of the Denver Company. If that be true such charge runs in favor of the Equitable Company as Trustee, and could not be foreclosed in this suit or in the Northern District of California or any jurisdiction other than that in which at least some of the property is situated. The assertion is predicated upon the provision of the contract declaring that the covenants of the Railway Companies parties to Contract B shall run with the respective railways of the parties. The contract contains a further provision declaring that the successors of either party shall be bound by an express trust to perform the obligations of such party.

In view of the decisions of the Supreme Court of the United States in *Des Moines R. R.* v. *Wabash*, 135 U. S., 576, it is difficult to declare just what the ultimate effect of these covenants may be. In that case it was held that a similar covenant did not create a lien taking priority to a mortgage subsequently executed. It is therefore a matter of doubt whether if a

lien exists it takes priority to the adjustment and refunding mortgage of the Denver Company, even if it can be established that the purchasers of bonds secured by those mortgages took with actual notice. Assuming that such charge exists, its assertion and complete enforcement at the present time will result in a receivership of the Denver Company and many years of litigation must ensue before the fact and the rank of the lien is established.

Without in any way abandoning the claim that such a lien exists and is in fact prior to the bonds of the Denver Company secured by the adjustment and refunding mortgage, the majority of the bondholders of the Western Pacific Railway assert that they have the right to realize upon the security mortgaged to secure both principal and interest of the debt owing to them without waiting till the value and rank of the guaranty is established and enforced.

Clearly, the right to realize upon the property mortgaged is not and cannot be suspended because the guarantee of the interest may be secured by an equitable charge.

Of course, the existence of these provisions purporting to create covenants running with the land do not make the Denver Company either a necessary or a proper party to the foreclosure suit. This is decided in the case of *Des Moines R. R. Co.* v. *Wabash Ry. Co.*, 135 U. S., 576, 581, where that court denied the right of one railroad to intervene in proceedings

to foreclose a mortgage upon another road, though the roads had entered into a contract providing:

> "This contract and any damages for the breach of same shall be a continuing lien upon the roads of the two contracting companies, their equipment and income, in whosesoever hands they may come, the lien on the Adel road being limited to so much thereof as lies between Waukee and Panora."

and the mortgage in process of foreclosure was executed after the contract.

Respectfully submitted,

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No. 2755

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EX PARTE THE EQUITABLE TRUST COMPANY OF NEW YORK, AS TRUSTEE OF THE FIRST MORTGAGE OF THE WESTERN PACIFIC RAILWAY COMPANY, PLAINTIFF IN THE ACTION OF THE EQUITABLE TRUST COMPANY OF NEW YORK, AS TRUSTEE, AGAINST WESTERN PACIFIC RAILWAY COMPANY.

BRIEF OF RESPONDENT IN REPLY TO PETITION FOR WRIT OF PROHIBITION.

GARRET W. McENERNEY,
JOHN S. PARTRIDGE,
Attorneys for Respondent.

Filed this.....day of March, 1916.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

PERNAU PUBLISHING COMPANY

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BRIEF OF RESPONDENT IN REPLY TO PETITION FOR WRIT OF PROHIBITION.

This is a petition for a writ of prohibition, to restrain the court below from putting in effect its order bringing in the Denver & Rio Grande Railroad Co., and the Missouri Pacific Railway Co. as parties to the action.

I.

IT IS ELEMENTARY THAT PROHIBITION WILL NOT LIE WHEN THE COURT HAS JURISDICTION.

Prohibition will only lie when the court is without jurisdiction, or has exceeded its jurisdiction.

It cannot be made to serve the office of an appeal or writ of error; and however erroneous the judgment of the court may be, still if it has jurisdiction of the subject-matter of the order or decree, the writ will not lie.

In the Matter of Rice, 155 U. S. 396, the Supreme Court says

> "Where it appears that the court whose action is sought to be prohibited has clearly no jurisdiction of the cause originally, or of some collateral matter arising therein, a party who has objected to the jurisdiction at the outset and has no other remedy is entitled to a writ of prohibition as a matter of right. But where there is another legal remedy by appeal or otherwise, or where the question of the jurisdiction of the court is doubtful, or depends on facts which are not made matter of record, or where the application is made by a stranger, the granting of refusal of the writ is discretionary. Nor is the granting of the writ obligatory where the case has gone to sentence, and the want or jurisdiction does not appear upon the face of the proceedings. Smith v. Whitney, 116 U. S. 167, 173 (29:601, 602); Ex Parte Cooper, 143 U. S. 472, 495 (36:232, 239). Tested by these rules, we are clear that a proper case is not made for awarding the writ of prohibition."

Jurisdiction is not limited to making correct decisions, either of law, or of fact. Thus, in Board of Commissioners v. Platt, 79 Fed. 570, the Court of Appeals for the Eighth Circuit quotes from Foltz v. St. Louis, etc. Ry. Co., 60 Fed. 316, as follows:

> "Jurisdiction of the subject-matter is the power to deal with the general abstract ques-

tion, to hear the particular facts in any case relating to this question, and to determine whether or not they are sufficient to invoke the exercise of that power. It is not confined to cases in which the particular facts constitute a good cause of action, but it includes every issue within the scope of the abstract question. Nor is this jurisdiction limited to making correct decisions. It empowers the court to determine every issue within the scope of its authority according to its own view of the law and the evidence, whether its decision is right or wrong; and every judgment or decision so rendered is final and conclusive upon the parties to it, unless reversed by writ or error or appeal, or impeached for fraud. Insley v. U. S. 14 Sup. Ct. 158; Cornett v. Williams, 20 Wall. 226; Des Moines Nav. & R. Co. v. Iowa Homestead Co., 123 U. S. 552, 8 Sup. Ct. 217; In re Sawyer, 124 U. S. 200, 221, 8 Sup. Ct. 482; Skillerns v. May's Ex'rs., 6 Cranch 267; McCormick v. Sullivant, 10 Wheat. 192; Hunt v. Hunt, 72 N. Y. 217; Colton v. Beardsley, 38 Barb. 30, 52; Otis v. The Rio Grande, 1 Woods 279, Fed. Cas. No. 10,613; Hamilton v. Railroad Co., 1 Md. Ch. 107; Evans v. Haefner, 29 Mo. 141, 147; State v. Weatherby, 45 Mo. 17; Rosenheim v. Hartsock, 90 Mo. 357, 365, 2 S. W. 473; State v. Southern Ry. Co., 100 Mo. 59, 13 S. W. 398; Hope v. Blair, 105 Mo. 85, 93, 16 S. W. 595; Musick v. Railway Co., 114 Mo. 309, 315, 21 S. W. 491. Wherever the right and the duty of the court to exercise its jurisdiction depend upon the decision of the question it is invested with the power to hear and determine, there its judgment, right or wrong, is impregnable to collateral attack, unless impeached for fraud."

In the Matter of Pollitz, 206 U. S. 323, the court below had made an order refusing to remand. The

question involved in the motion to remand was whether or not certain other persons were necessary parties. It was distinctly held, that inasmuch as the court had jurisdiction to determine that question, the extraordinary remedy of *mandamus* would not lie. The court says:

> "The issue on the motion to remand was whether such determination could be had without the presence of defendants other than the Wabash Railroad Company, and this was judicially determined by the circuit court, to which the decision was by law committed.
>
> "The application to this court is for the issue of the writ of mandamus directing the circuit court to reverse its decision, although in its nature a judicial act, and within the scope of its jurisdiction and discretion.
>
> "But mandamus cannot be issued to compel the court below to decide a matter before it in a particular way or to review its judicial action had in the exercise of legitimate jurisdiction, nor can the writ be used to perform the office of an appeal or writ of error."

And it has been so often decided that prohibition will never lie, unless the court has *clearly* exceeded its jurisdiction, that citation may seem unnecessary. We may, however, refer to:

Ex parte Gordon, 104 U. S. 515;

Ex parte Detroit River Ferry Co., 104 U. S. 519;

Ex parte Slayton, 105 U. S. 451;

Smith v. Whitney, 116 U. S. 167;

Re Garnett, 141 U. S. 1.

In State of California v. S. P. Co., 157 U. S. 229 (39 L. Ed. 690), it is said:

"It was held in Mallow v. Hinde, 25 U. S. 12 Wheat. 193 (6:599), that where an equity cause may be finally decided between the parties litigant without bringing others before the court who would, generally speaking, be necessary parties, such parties may be dispensed with in the circuit court if its process cannot reach them or if they are citizens of another state; but if the rights of those not before the court are inseparably connected with the claim of the parties litigant so that a final decision cannot be made between them without affecting the rights of the absent parties, the peculiar constitution of the circuit court forms no ground for dispensing with such parties. And the court remarked: 'We do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must equally apply to all courts of equity whatever may be their structure as to jurisdiction. We put it upon the ground that no court can adjudicate directly upon a person's right, without the party being actually or constructively before the court.'

"In Shields v. Barrow, 58 U. S., 17 How. 130 (15:158), the subject is fully considered by Mr. Justice Curtis speaking for the court. The case of Russell v. Clarke, 11 U. S. 7 Cranch, 98 (3:281), is there referred to as pointing out three classes of parties to a bill in equity; '1. Formal parties. 2. Persons having an interest in the controversy, and who ought to be made parties in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. These persons are commonly termed necessary parties; but if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensable parties. 3.

Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience.' Reference is made to the Act of Congress of February 28, 1839 (5 Stat. at L. 321, chap. 36) and the 47th Rule of equity practice. The first section of the statute, carried forward, into section 738 of the Revised Statutes enacted: 'That where, in any suit at law or in equity, commenced in any court of the United States, there shall be several defendants, any one or more of whom shall not be inhabitants of, or found within the district where the suit is brought or shall not voluntarily appear thereto, it shall be lawful for the court to entertain jurisdiction, and proceed to the trial and adjudication of such suit between the parties who may be properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties; not regularly served with process, or not voluntarily appearing to answer; and the nonjoinder of parties who are not so inhabitants, or found within the district, shall constitute no matter of abatement, or other objection to said suit.' But Mr. Justice Curtis remarked that while the Act removed any difficulty as to jurisdiction between competent parties regularly served with process, it did not attempt to displace that principle of jurisprudence on which the court rested, Mallow v. Hinde, 25 U. S. 12 Wheat. 193 (6:599), and so far as the 47th Rule was concerned, that was only a declaration, for the government of practitioners and courts of the effect of the Act of Congress and of the previous decisions of the court on the subject of that rule. And Mr. Justice Curtis added: 'It remains true, notwithstanding the Act of Congress and the 47th Rule, that a cir-

cuit court can make no decree affecting the rights of an absent person, and can make no decree between the parties before it, which so far involves or depends upon the rights of an absent person, that complete and final justice cannot be done between the parties to the suit without affecting those rights. To use the language of this court, in Elmendorf v. Taylor, 23 U. S. 10 Wheat. 167 (6:294), "If the case may be completely decided, as between the litigant parties, the circumstance that an interest exists in some other person, whom the process of the court cannot reach, as if such party be a resident of another state, ought not to prevent a decree upon its merits." But if the case cannot be thus completely decided, the court should make no decree.'

"Mr. Daniell thus lays down the general rule: 'It is the constant aim of a court of equity to do complete justice by deciding upon and settling the rights of all persons interested in the subject of the suit, so as to make the performance of the order of the court perfectly safe to those who are compelled to obey it, and to prevent future litigation. For this purpose, all persons materially interested in the subject, ought generally, either as plaintiffs or defendants, to be made parties to the suit, or ought by service upon them of a copy of the bill, or notice of the decree to have an opportunity afforded of making themselves active parties in the cause, if they should think fit.' 1 Dan. Ch. Pl. and Pr. (4th Am. ed.) 190."

The state of the record was this: (1) there was before the court a petition of the receivers, asking for time to report, and ask instructions upon, the relations with the Denver & Rio Grande; (2) a petition by the receivers as to whether or not they

should bring suit against the Denver & Rio Grande. In both of these matters, the Denver & Rio Grande was certainly interested, and they could not be decided without their presence. In this connection, the language of this court, in a case heard before Judges Gilbert, Morrow, and Hawley (Consolidated Water Co. v. San Diego, 93 Fed. 849), it is said:

> "From this brief reference to the allegations of the bill, it will readily be seen that the San Diego Water Company has an interest in the subject-matter of the suit, and that any decree that might finally be rendered therein would affect its interest. It is certainly interested in obtaining the relief sought for by the complainant, and would doubtless be entitled, in its own behalf, if so disposed, to bring a suit in its own name, and litigate the same question, in a competent court. Its presence is necessary to a full and complete determination of the questions in controversy in this suit. To determine some of the questions raised by the bill as to the reasonableness of the rates fixed by the ordinance, it will involve an investigation of the management of the affairs of the company. In Shields v. Barrow, 17 How. 139, 139, indispensable parties are described as 'persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience.' See also, Barney v. Baltimore City, 6 Wall. 281, 284; Cunningham v. Railroad Co., 109 U. S. 446, 456, 3 Sup. Ct. 292, 609; Cattle Co. v. Frank, 148 U. S. 603, 13 Sup. Ct. 691.
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> "In Gregory v. Stetson, 133 U. S. 579, 586, 10 Sup. Ct. 422, 424, where the circuit court

entered a decree dismissing the bill for want of proper parties, Lamar, J., in delivering the opinion of the court, said:

"'We are of opinion that the decree of the court below must stand. The rule as to who shall be made parties to a suit in equity is thus stated in Story Eq. Pl. Par. 72:

"' '"It is a general rule in equity * * * that all persons materially interested, either legally or beneficially, in the subject-matter of the suit are to be made parties to it, either as plaintiffs or as defendants, * * * so that there may be a complete decree, which shall bind them all. By this means the court is enabled to make a complete decree between the parties, to prevent future litigation by taking away the necessity of a multiplicity of suits, and to make it perfectly certain that no injustice is done, either to the parties before it, or to others who are interested in the subject-matter, by a decree which might otherwise be grounded upon a partial view, only, of the real merits. When all the parties are before the court, the whole case may be seen; but it may not, where all the conflicting interests are not brought out upon the pleadings by the original parties thereto." See, also, 1 Daniell, Ch. Pl. & Prac. 246 et seq. In the case before us, we are unable to see how any final decree could be rendered, affecting the parties to the contract sued on, without making them all parties to the suit. It is an elementary principle that a court cannot adjudicate directly upon a person's right, without having him either actually or constructively before it.'

"See also, Davenport v. Dows, 18 Wall. 626; Bland v. Fleeman, 29 Fed. 669, 673; Water Co. v. Babcock, 76 Fed. 243; Mangels v. Brewing Co., 53 Fed. 513; Board v. Blair, 70 Fed. 414, 419.

> "The general rule as to parties, as expressed in many of the authorities, is to the effect that all persons should be made parties to a suit in equity who are directly interested in obtaining or resisting the relief prayed for in the bill of granted in the decree. And in a case like the present, where the trial of the suit would necessarily involve the management and conduct of the affairs, and an adjudication of the rights, of the San Diego Water Company, it is essentially necessary that it should be made a party to the suit, either as a plaintiff or a defendant. 1 Fost. Fed. Prac. Par. 42; Gaylords v. Kelshaw, 1 Wall. 81; New Orleans Waterworks Co. v. City of New Orleans, 164 U. S. 471, 480, 17 Sup. Ct. 161; Chadbourn v. Coe, 45 Fed. 822, 825; Gardner v. Brown, 21 Wall. 36, 40; Mallow v. Hinde, 12 Wheat. 193, 198; California v. Southern Pac. Co., 157 U. S. 229, 15 Sup. Ct. 591."

In this connection, we desire to call attention to the litigation in the case of the Wabash Railroad, as applicable to many of the questions, particularly of procedure, involved here.

In 1862, the Toledo & Wabash issued and sold $600,000.00 par value of "equipment bonds." This paper was not secured by any mortgage, deed of trust, or other direct lien upon any property. The Toledo & Wabash was afterwards consolidated, with other railways in the States of Ohio, Indiana, Illinois, and Missouri, into the "Wabash System." This consolidation was by virtue of the corporation laws of the several states. The constituent companies, and finally the consolidated company, created certain bond issues, secured by mortgages and deeds of trust. Upon default in payment of the interest

upon one of these issues, an action was brought in 1875, a receiver appointed, and a decree directing the sale of the property was made and entered. A sale was made to a bondholders' committee, which formed the Wabash, St. Louis & Pacific Railway Company, and the property was conveyed to this new corporation by the committee. One Ham then brought an action in the United States Circuit Court for the District of Indiana. Ham was the owner of certain of these equipment bonds; and he contended that they constitued a lien upon so much of the property as had formerly belonged to the Toledo & Wabash, and that he was entitled to follow that property through the consolidation, the decree, and the sale. The Circuit Court held with him, but the Supreme Court reversed the decree, declaring that the equipment bonds did not constitute a lien.

Wabash, etc., Ry. Co. v. Ham, 114 U. S. 587.

While this litigation was pending in the Federal Courts, one Compton brought his action in the State Court of Ohio. He was also the owner of a large block of these equipment bonds. He made the same contentions as did Ham, and the *Nisi Prius* Court of Ohio gave him judgment. Upon appeal, this judgment was affirmed by the Supreme Court of Ohio, although that court was constrained to definitively align itself in opposition to the authority of the Supreme Court of the United States in the Ham case.

Compton v. Wabash, etc., Ry. Co., 16 N. E., 110.

One of the justices of the Supreme Court of Ohio, however, dissented, holding himself bound both by the authority and reasoning of the Ham case.

Compton v. Wabash, etc., Ry. Co., 18 N. E. 380.

This, then, was the state of the record:

1. The United States Circuit Court for Ohio had by its decree of foreclosure, sold the whole property;

2. The United States Circuit Court for Indiana, in the Ham case, had decreed the equipment bonds to be a lien, but this decree had been reversed by the Supreme Court of the United States, and the bonds declared *not* to be a lien;

3. The Supreme Court of Ohio, in the Compton case, had decreed that the bonds *were* a lien, and, ordered the property sold to satisfy them.

James R. Jessup and Edward H. Dixon, trustees under a mortgage of the reorganized Wabash System, brought a suit in the United States Circuit Court of Ohio for the foreclosure of their mortgage. This action was pending and the reorganized road was in the hands of a receiver at the time of the decision of the Supreme Court of Ohio in the Compton case. After the rendition of the judgment, but before execution, the complainants obtained an order of the United States Circuit Court, based upon Section 8 of the Act of Congress of March 3, 1875, making Compton a party, directing that subpoena be served upon him in the District of Co-

lumbia, and requiring him to appear and set up his lien. After Compton's objections to the jurisdiction had been overruled, he answered, setting up the judgment of the Ohio State Court.

The U. S. Circuit Court decreed that he had a lien by virtue of the decision of the State Court, but made it subordinate to the four divisional mortgages on the system. A decree was made, directing sale under the foreclosure, but saving the rights of Compton.

An appeal was taken to the U. S. Circuit Court of Appeals of the Sixth Circuit. The main opinion, by Judge Taft, is exceedingly long, and is found in 68 Fed. 263. The first point to which we desire to call attention, is on the question of jurisdiction. Judge Taft says:

> "When the bill was filed in the court below, the property which it was thereby sought to sell on foreclosure was in the possession of receivers appointed by that court in a previous litigation instituted to foreclose mortgages junior to the Knox and Jesup mortgage, and to sell the road to pay all junior liens and floating indebtedness. It is true the litigation had proceeded to foreclosure sale and final decree; but for some reason, not plainly disclosed, the court refused to deliver possession to the purchasers, and retained it in the custody of the court for the purpose of protecting the interests of all the parties to the original litigation. Knox and Jesup wished to foreclose their mortgage, to marshal all liens, to sell the road at the highest price, to preserve the road and its income from waste by the appointment of a receiver. It is manifest that no other court than that in which the receivers then in possession had been ap-

pointed *could grant such relief*. Whether other courts could decree foreclosure and marshal liens, or not, certainly no other court could take possession of and sell the road, *and deliver an unclouded title to a purchaser*. If Knox and Jesup could not file their bill in the court below, then the act of that court in maintaining possession of the mortgaged property through its receivers would result in great injustice to them, and would constitute an abuse of its process. To prevent this, the court below had inherent ancillary jurisdiction, pending its possession of the railroad to hear and determine all petitions for relief presented to it in respect of the possession and control of the road. It is of no importance that the custody of the railroad was likely soon to be changed from the court to the intending purchaser under the previous foreclosure proceedings, at which time any tribunal of competent jurisdiction could give all the relief prayed by Knox and Jesup. Their mortgage was then due. They were not obliged to await the uncertain delays of other litigation before taking steps to assert their rights. They therefore properly appealed to the court below, as the only tribunal which could do so, to give them adequate relief at once; and this was properly accorded to them, without regard to the citizenship of the parties to their bill. The foregoing reasoning is fully supported by many decisions of the Supreme Court. Necessity and comity both require that where, by its officers acting under color of its order or process, a court has taken into its custody property of any kind, another court, though of equal and co-ordinate jurisdiction, should not be permitted either to oust the possession of the first court, or *in any way to interfere with its complete control and disposition of the property for the purpose of the cause in which its action has been invoked*. This principle has been laid down by the Supreme

Court of the United States in a long line of cases. Hagan v. Lucas, 10 Pet. 400; Williams v. Benedict, 8 How. 107; Wiswall v. Sampson, 14 How. 52; Peale v. Phipps, Id. 368; Bank v. Horn, 17 How. 151; Pulliam v. Osborn, Id. 471; Freeman v. Howe, 24 How. 450; Youley v. Lavender, 21 Wall. 276; Bank v. Calhoun, 102 U. S. 256; Barton v. Barbour, 104 U. S. 126; Krippendorf v. Hyde, 110 U. S. 276, 4 Sup. Ct. 27; Covell v. Heyman, 111 U. S. 176, 4 Supt. Ct. 355; Heidritter v. Oilcloth Co., 112 U. S. 294, 5 Sup. Ct. 135; Gumbel v. Pitkin, 124 U. S. 131, 8 Sup. Ct. 379; Railroad Co. v. Gomila, 132 U. S. 478, 10 Sup. Ct. 155; In re Tyler, 149 U. S. 181, 13 Sup. Ct. 785; Porter v. Sabin, 149 U. S. 473, 13 Sup. Ct. 1008; Byers v. McAuley, 149 U. S. 608, 13 Sup. Ct. Rep. 906. Again every court has inherent equitable power to prevent its own process from working injustice to any one, and may entertain a petition by the aggrieved person, *either in the form of a simple motion,* or by intervention *pro interesse suo* in the cause in which the process issued, or by ancillary or dependent bill in equity, and may afford such relief as right and justice require. The existence of such a power, independent of statutory jurisdiction, is recognized by the Supreme Court in Freeman v. Howe, 24 How. 250; Minnesota Co. v. St. Paul Co., 2 Wall. 609-633; Railroad Co. v. Chamberlain, 6 Wall. 748; Krippendorf v. Hyde, 110 U. S. 276, 4 Sup. Ct. Rep. 27; Pacific R. Co. of Missouri v. Missouri Pac. Ry. Co., 111 U. S. 505, 4 Sup. Ct. 583; Stewart v. Dunham, 115 U. S. 61, 5 Sup. Ct. 1163; Phelps v. Oaks, 117 U. S. 236, 6 Sup. Ct. 714; Dewey v. Coal Co., 123 U. S. 329; 8 Sup. Ct. 148; Gumbel v. Pitkin, 124 U. S. 131, 8 Sup. Ct. 379; Johnson v. Christian, 125 U. S. 642-646, 8 Sup. Ct. 989, 1135; Morgan L. & T. Railroad & Steamship Co. v. Texas Cent. Ry. Co., 137 U. S. 171, 11 Sup. Ct. 61.

> Now, it frequently happens that under the process of the federal courts, exercising the original and lawful jurisdiction conferred expressly by the federal constitution and statutes, possession is taken and control exercised over property in which persons not indispensable parties to the suit have an interest, *by lien, mortgage, and in other ways.* In such cases there often is no diversity of citizenship between such persons and the plaintiff or defendant to the suit which would warrant the federal court in hearing an independent suit between them. But it may be essential, to preserve intact their rights in the property that such third persons should be permitted, at once, to have specific relief, which can only *be granted by a court having possession and control of the property.* And yet, in accordance with the principle already stated, no court but the federal court can exercise possession and control over the property in its custody. Of necessity, therefore, the federal courts exercise an ancillary jurisdiction in such cases; and third persons are permitted to come into the federal court, and set up their interest in the property, and secure the same full and adequate protection and relief to which they would be entitled in any court of competent jurisdiction, were the property not impounded by the federal court."

In upholding the right of the court to compel Compton to come in, the Judge says:

> "We come now to the objection that, even if the jurisdiction of the bill be conceded, the court had no power to bring Compton before it. The argument is that the right of the federal court to grant relief to persons claiming an interest in property in its custody, without regard to their citizenship, is founded on its duty to prevent an abuse of its process to the

prejudice of strangers to the suit, and is dependent on the wish of such strangers to secure that relief, expressed in an affirmative and voluntary appeal for the aid of the court, and that no power exists in the court to compel such a stranger to come into court against his will, simply because he claims an interest in the property impounded, if his citizenship would prevent the issue of such process against him in the original suit. Let is be conceded, for the purpose of argument, that the distinction made is a sound one. It does not help Compton. He was not brought into court to prevent prejudice to him by the federal court's possession of the res. He was brought into court to prevent prejudice to Knox and Jesup, who, otherwise having no right to invoke the action of the federal court, did so on the ground that its possession of the res prevented their getting full and adequate relief in the state tribunals, and who were therefore entitled to bring into the case every one whose presence as a party was necessary to give them such relief. They had the right to have the railroad sold free from all liens, so that the purchaser should have an unclouded title, *and this could not be done without Compton's presence.* Compton was not a resident of the district in which the court's ordinary process ran, and he could not be brought in by subpoena. Knox and Jesup's bill was, however, a proceeding against property in the jurisdiction of the court. It was competent for congress, in such a case, to provide for constructive service, which would bind the person against whom it issued to the extent only of the res which lay within the territorial jurisdiction of the court."

Pennoyer v. Neff, 95 U. S. 714;

Heidritter v. Oilcloth Co., 112 U. S. 294, 300, 301, 5 Sup. Ct. 135.

Statutory provision of this kind is found in Section 8 of the act of March 3, 1875 (18 Stat. 470), which was not repealed by the jurisdiction act of March 3, 1887 (24 Stat. 552), or of August 13, 1888 (25 Stat. 433) and is still in force.

It provides:

> "That when in any suit, commenced in any circuit court of the United States, to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within, the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur, by a day certain to be designated which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks; and in case such absent defendant shall not appear, plead, answer or demur within the time so limited, or within some further time to be allowed by the court, in its discretion, and upon proof of the service or publication of said order, and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction and proceed to the hearing and adjudication of such suit in the same manner as if said absent defendant had been served with process within the said dis-

trict; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district.'

The meaning of this statute is not doubtful. It applies to every suit of the kind mentioned in the section provided, only, the circuit court of the United States in which the proceeding is taken has otherwise jurisdiction of it. Whether it be a suit arising under the laws and constitution of the United States, or a suit to which the United States is a party, or a suit in which there is a controversy between citizens of different states, or a suit like the one at bar, of which the circuit court has jurisdiction indispensable and ancillary to its original jurisdiction, if it also satisfies the description of the statute, the process therein provided is available. The case of Brigham v. Luddington, 12 Blatchf. 237, Fed. Cas. No. 1,874, has nothing in it to conflict with this conclusion. In that case, Circuit Judge Woodruff refused to make an order for substituted process against the owner of the property, because he was a citizen of the same state as the complainant, and his presence as a party would oust the jurisdiction of the court. The bill was an original one, and the jurisdiction could only rest on diverse citizenship. In the suit at bar, Compton's presence as party defendant would not oust the jurisdiction of the court, because as already shown, it is not dependent on diverse citizenship. The circuit court had jurisdiction of the cause otherwise than by virtue of the section above quoted. The suit was brought to enforce a legal and equitable lien on real estate lying in the district, and to remove the cloud of Compton's lien from the title of the purchaser at the foreclosure sale. Compton was therefore properly brought into court by the substituted or

constructive process provided in the section above quoted. Farmers' Loan & Trust Co. v. Houston & T. C. Ry. Co., 44 Fed. 115; Greeley v. Lowe, 155 U. S. 58, 15 Sup. Ct. 24."

In holding that the court has the power to compel a party to the action to convey property lying outside its territorial limits, it is said:

> "That a court has the power, when it has personal jurisdiction over the mortgagor, to foreclose the mortgage on property lying outside of its territorial jurisdiction, is plain, and is fully established by the case of Muller v. Dows, 94 U. S. 44, but it must exercise this power by a decree aginst the person compelling the mortgagor to convey the equity of redemption. Otherwise the decree is inoperative.
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> Carpenter v. Strange, 141 U. S. 87, 106, 11 Sup. Ct. 960."

On the point that a junior incumbrancer is entitled to an accounting and credit for income during receivership, and after sale, it is said:

> "It remains to inquire how the amount to be paid in redemption of the two divisional mortgages shall be estimated. Of course, the mortgagees are entitled to the principal of their mortgages, with interest to the time of tender; but the more doubtful question is whether the amount thus to be calculated must be reduced by the net earnings of the mortgaged property, i. e., the Ohio division, since the receivers turned over possession of the road to the purchaser. Compton secures his right to redemption through the original mortgagors. Whatever they would have had to pay to redeem the mortgages, he must pay,—no more, no less. It is the general rule that a mortgagee in possession, when his mortgage is redeemed, must

account for the rents and profits during his tenancy. Russell v. Southard, 12 How. 139, 155. The Wabash Railroad Company, as the successor in title of the purchasers at the sale, is to be regarded as the first Ohio mortgagee in possession, and therefore liable to account for the rents and profits or net earnings of the mortgaged property, in ascertaining the amount required to redeem the principal and interest of the mortgages. Our view of the saving clause in the decree for sale makes Compton's attitude with respect to the foreclosure sale quite like that of a junior incumbrancer with respect to a sale in a foreclosure proceedings brought by a senior mortgagee, to which the former was not a party. In such a case the weight of authority is that the purchaser is, with reference to the junior incumbrancer, the assignee of a mortgage in possession, and therefore liable to account for the rents and profits. Jones Mortg. (5th Ed.), Sec. 1395; 2 Hil Morg. 158; Vanderkemp v. Skelton, 11 Paige 28; Walsh v. Insurance Co., 13 Abb. Prac. 33; Van Duyne v. Shann, 39 N. J. Eq. 6; Bunce v. West, 62 Iowa 80, 17 N. W. 179; Spurgin v. Adamson, 62 Iowa 661, 18 N. W. 293; Ten Eyck v. Casad, 15 Iowa 524; Murdock v. Ford, 17 Ind. 52. In two cases a different view has been taken. Catterlin v. Armstrong, 79 Ind. 514; Renard v. Brown, 7 Neb. 449; 2 Jones Morg. (5th Ed.), Sec. 1118 A.

The theory upon which the last-mentioned cases go, is that, by the defective sale, not only the mortgage passed to the purchaser by assignment, but also the equity of redemption, and the purchaser must be presumed to be holding the property as owner of the equity, rather than as mortgagee, and therefore not to be accountable for the rents and profits. If the purchaser becomes the possessor of the property by the payment of anything substantial over and above the foreclosed mortgage debt, the

argument is a strong one that the rents and profits should be used to recompense him for such an outlay in securing the possession of the property. Gray v. Nelson, 77 Iowa 63, 41 N. W. 566. But where, as in the case at bar, the purchase price is equal only to the amount due on the first two mortgages, it would not seem consistent with equity to permit such a purchaser to maintain, against a junior incumbrancer seeking to redeem, that he is receiving the rents and profits as the owner of the equity, rather than as the owner of the mortgages which are galvanized into life to meet and defeat the otherwise good claim of the junior incumbrancer to a first lien. When the sale in this case took place, the mortgaged property was is the hands of receivers,—that is, the mortgagees were in possession—and the rents and profits were applicable to the mortgages in the order of their priority. Howell v. Ripley, 10 Paige 43; Miltenberger v. Railway Co., 106 U. S. 286, 1 Sup. Ct. Rep. 140. If, as to Compton, the sale merely operated as an assignment of the various interests of the parties, the purchaser, as the assignee of the prior mortgages in possession, would seem to have derived his possession, and to maintain it, through the mortgagees, rather than from the owner of the equity of redemption. For these reason, I think that Compton is entitled to an account of the net earnings of the Ohio Division of the Wabash Railroad Company over and above all operating expenses, including reasonable and necessary repairs, and that this sum should be deducted from the principal and interest due on the two mortgages. Of course, the railroad company is entitled to credit for all taxes paid by it, and for the cash advanced by it, in lieu of the bonds under the first mortgages, to pay receiver's obligations and other expenses properly chargeable as liens against the corpus of the road prior in right to the mortgages."

II.

THE DISTRICT COURT CLEARLY HAS JURISDICTION TO BRING IN NEW PARTIES, EITHER ON MOTION OR SUA SPONTE.

Equity rule 37 provides:

> "Any person may at any time be made a party, if his presence is necessary or proper to a complete determination of the cause."

In Minnesota v. Northern Securities Co., 184 U. S. 199, it is said:

> "The general rule in equity is that all persons materially interested, either legally or beneficially, in the subject-matter of a suit, are to be made parties to it, so that there may be a complete decree, which shall bind them all. By this means the court is enabled to make a complete decree between the parties, to prevent future litigation, by taking away the necessity of a multiplicity of suits, and to make it perfectly certain that no injustice is done, either to the parties before it, or to others who are interested in the subject-matter, by a decree which might otherwise be granted upon partial view only of the real merits. When all the parties are before the court, the whole case may be seen; but it may not, where all the conflicting interests are not brought out upon the pleadings by the original parties thereto. Story, Eq. Pl. § 72.
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> "The established practice of courts of equity to dismiss the plaintiff's bill if it appears that to grant the relief prayed for would injuriously affect persons materially interested in the subject-matter who are not made parties to the suit is founded upon clear reasons, and may be enforced by the court sua sponte, though not raised by the pleadings or suggested by the counsel. Shields v. Barrow, 17 How. 130, 15 L. ed. 158; Hipp v. Babin, 19 How. 271, 278,

15 L. ed. 633, 635; Parker v. Winnipsieogee Lake Cotton & Woolen Co., 2 Black, 545, 17 L. ed. 333.

"In the case of Shields v. Barrow, 17 How. 130, 15 L. ed. 158, the question was fully discussed, and it was shown, upon review of the previous cases, that there are three classes of parties to a bill in equity. They are: 1. Formal parties. 2. Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. These persons are commonly termed necessary parties; but if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensable parties. 3. Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience. The court in respect to the act of Congress of February 28, 1839, 5 Stat. at L. 321, chap. 36, and to the 47th rule in equity practice said:

"The 1st section of that statute enacts 'that when in any suit, at law or in equity, commenced in any court of the United States, there shall be several defendants, any one or more of whom shall not be inhabitants of or found within the district where the suit is brought, or shall not voluntarily appear thereto, it shall be lawful for the court to entertain jurisdiction, and proceed to the trial and adjudication of such suit between the parties, who may be properly before it; but the judgment or decree

rendered therein shall not conclude or prejudice other parties not regularly served with process, or not voluntarily appearing to answer; and the nonjoinder of parties, who are not so inhabitants, or found within the district, shall constitute no matter of abatement or other objection to said suit.'

"This act relates solely to the nonjoinder of persons who are not within the reach of the process of the court. It does not affect any case where persons, having an interest, are not joined because their citizenship is such that their joinder would defeat the jurisdiction; and, so far as it touches suits in equity, we understand it to be no more than a legislative affirmance of the rule previously established by the cases of Cameron v. M'Roberts, 3 Wheat. 591, 4 L. ed. 467; Osborn v. Bank of United States, 9 Wheat. 738, 6 L. ed. 204, and Harding v. Handy, 11 Wheat. 132, 6 L. ed. 437. For this court had already there decided that the nonjoinder of a party who could not be served with process would not defeat the jurisdiction. The act says it shall be lawful for the court to entertain jurisdiction; but as is observed by this court, in Mallow v. Hinde, 12 Wheat. 198, 6 L. ed. 600, when speaking of a case where an indispensable party was not before the court 'we do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must equally apply to all courts of equity; whatever may be their structure as to jurisdiction; we put it on the ground that no court can adjudicate directly upon a person's right, without the party being either actually or constructively before the court.' So that, while this act removed any difficulty as to jurisdiction, between competent parties regularly served with process, it does not attempt to displace that principle of jurisprudence on which the court rested the case last mentioned. And the 47th rule is only a declaration, for the gov-

ernment of practitioners and courts, of the effect of this act of Congress, and of the previous decisions of the court, on the subject of that rule. Hogan v. Walker, 14 How. 36, 14 L. ed. 315.

"'It remains true, notwithstanding the act of Congress and the 47th rule, that a circuit court can make no decree affecting the rights of an absent person, and can make no decree between the parties before it, which so far involves or depends upon the rights of an absent person that complete and final justice cannot be done between the parties to the suit without affecting those rights.'

"California v. Southern P. Co., 157 U. S. 229, 39 L. ed. 683, 15 Sup. Ct. Rep. 591, was a case in several particulars like the present one. There a bill was filed in this court by the state of California against the Southern Pacific Company, a corporation of the state of Kentucky, claiming title and jurisdiction by the state over certain large tracts of land lying upon the shores of the bay of San Francisco and over the harbor waters of said bay, including San Antonio creek, and averring that the Southern Pacific Company claimed adversely to the state, and was engaged in placing structures in and upon said tracts of land, thereby obstructing navigation in the bay and adjoining waters. The bill prayed for a decree quieting the title of the state and enjoining the defendant company from maintaining the structures that it had placed upon said tracts and the adjacent waters. The defendant company answered the bill, denying the ownership of the complainant in the premises in dispute, and setting forth its own title derived from the town of Oakland, as to the whole of the water front of that town, through one Carpentier, as grantee of said town by ordinance and deed of conveyance, and claiming that by subsequent mesne conveyances the said title and property

had become vested, as to a part thereof, in the Central Pacific Railroad Company, and, as to another part, in the South Pacific Coast Railway Company, and in the defendant company as lessee. It further was claimed that certain ordinances and deeds of the town of Oakland operated as a grant by the city of Oakland and the state of California of the land to the Oakland Water Front Company, as grantee or alienee of Carpentier. The case was duly put at issue, and a commissioner was appointed to take testimony therein and to return the same to the court.

"When the case came on for hearing it was held by this court that the city of Oakland and the Oakland Water Front Company were so situated in respect to the litigation that the court ought not to proceed in their absence. In reaching this conclusion the court reviewed the cases, including the cases above cited and others.

"Upon the contention that the city of Oakland and the Oakland Water Front Company might be made parties defendant, and the cause thus enabled to proceed with the case, the court held that this could not be done, because this court could not exercise original jurisdiction in a suit between a state on the one hand and a citizen of another state and citizens of the complainant state on the other. Accordingly, the bill was dismissed for want of parties who should be joined, but could not be without ousting our jurisdiction."

When it appears to a court of equity that a case, otherwise presenting ground for its action, cannot be dealt with because of the absence of essential parties, it is usual for the court, while sustaining the objection, to grant leave to the complainant to amend by bringing in such parties. But when it

likewise appears that necessary and indispensable parties are beyond the reach of the jurisdiction of the court, or that, when made parties, the jurisdiction of the court will thereby be defeated, for the court to grant leave to amend would be useless. Section 2 of Article 3 of the Constitution of the United States.

In the early case of Caldwell v. Taggart, 4 Pet. 190, the Supreme Court said:

> "In reply to all these grounds of reversal, for want of parties, or for want of due maturation for a final hearing, it has been urged that nothing is ordered to be mortgaged or sold beside Caldwell's own interest, whatever that may be. But this we conceive to be an insufficient answer. It is not enough that a court of equity causes nothing but the interest of the proper party to change owners. Its decrees should terminate and not instigate litigation. Its sales should tempt men to sober investment, and not to wild speculation. Its process should act upon known and definite interests, and not upon such as admit of no medium of estimation. It has the means of reducing every right to certainty and precision, and is therefore bound to employ those means in the exercise of its jurisdiction.
>
> "There is no want of learning in the books on this subject. The general rule is laid down thus: 'However numerous the persons interested in the subject of a suit, they must all be made parties plaintiffs or defendants, in order that a complete decree may be made; it being the constant aim of a court of equity to do complete justice by embracing the whole subject, deciding upon and settling the rights of all persons interested in the subject of a suit to make the performance of the order perfectly

safe to those who have to obey it, and to prevent future litigation.' And again, 'all persons are to be made parties who are legally or beneficially interested in the subject-matter and result of the suit,' extending in most cases to heirs-at-law, trustees and executors.

"Thus, in a case in which a remainderman in tail brought a bill against the tenant for life to have the title deeds brought into court, and there were annuitants on the reversion, and a child interested under a trust term of years prior to the limitation to the plaintiff—that is, incumbrances prior and posterior to the plaintiff—Lord Hardwicke (3 Atk. 570) refused a decree without first making them parties. So, where husband tenant for life, remainder to his wife for life, remainder over, brought his bill without joining the wife, the objection was made and sustained on the ground that if there was a decree against the husband, it would not bind the wife. (1 Atk. 289).

"So, if an under mortgagee brings his bill to foreclose the original mortgagor, he must make the first mortgagee a party. (3 P. W. 643.) This is the relation in which the complainants here seek to place themselves in reference to Mr. Singleton.

"And there are various cases in which, though the heir-at-law is not a necessary party, he is made such in practice, and the reason assigned is to free the estate from every blame that may lessen its value at the sale. (2 Ves. 431; 3 P. W. 91; 3 Br. Ch. Rep. 229, 365.)

"And so in cases of indefinite or blended interests, all the participators are necessary parties; as where a residue is devised to several, or even devised by specified shares.

"It is clear, then, that this cause must go back as well to have the necessary parties made as to have the decree reformed and reduced to legal precision.

"It is true this course might have been avoided if this court, upon looking through the complainants' case and allowing the full benefit of everything that has been legally established, had seen that a decree might now finally be rendered against the appellant. It would then have been nugatory to send it back for parties. But such is not the conclusion to which this court has arrived; it has already expressed the opinion that to a certain extent it is a very clear case for relief, and all the difficulties arise upon the nature of the relief prayed and granted. There is no knowing what new aspect may be given to the cause, when all the necessary parties come in and answer. But as it is now presented, had the prayer for specific relief upon the Sulphur Springs been out of the cause, it would not have been sent back without such a decree against the defendant, Caldwell, as the court, below ought to have rendered."

III.

THE DENVER AND RIO GRANDE IS A NECESSARY AND PROPER PARTY FROM EVERY POSSIBLE POINT OF VIEW.

It would seem clear that no decree can be entered in this case which will not affect the Denver & Rio Grande: (1) because it is elementary that the decree *nisi* must direct the terms upon which the property of the Western Pacific shall be sold—that is, either burdened by, or free from the covenants of Contract "B"; (2) because the final decree must direct how the proceeds of the sale are to be distributed. This involves a construction of that portion of the First Mortgage to the effect that money derived from a sale shall be applied "without prefer-

ence or priority of principal over interest or of interest over principal."

First Mortgage, Article V, Section 10.

Section 10. The purchase money, proceeds or avails of any sale of the mortgaged and pledged premises and property, together with any other moneys which may then be held by the Trustee or be payable to it under any of the provisions of this indenture as part of the trust estate, shall be applied as follows:

First. To the payment of the costs, expenses, fees and other charges of said sale, and a reasonable compensation to the Trustee, its agents and attorneys, and to the payment of all expenses, liabilities and advances incurred or disbursements made by the Trustee, and to the payment of all taxes, assessments or liens prior to the lien of these presents, except any taxes, assessment or other superior liens subject to which such sale shall have been made.

Second. To the payment of the whole amount due, owing or unpaid upon the bonds hereby secured for principal and interest, with interest on the overdue installments of interest at the rate of five per cent. per annum, and, in case such proceeds shall be insufficient to pay in full the whole amount so due and unpaid upon the said bonds, then to the payment of such principal and interest without preference or priority of principal over interest or of interest over principal or of any installment of interest over

any other installment of interest, ratably, according to the aggregate of such principal and to the accrued and unpaid interest.

Third. Any surplus then remaining to the Railway Company, its successors or assigns, or to whomsoever may be lawfully entitled to receive the same.

The Denver, of course, is vitally interested in this distribution of the funds, because its liability, *pro tanto* depends upon it; (3) because the decree *nisi* must fix the upset price, and upon that price is very apt to depend the amount of the deficiency judgment, and therefore the amount of the Denver's future liability.

But the property of the Western Pacific is tied up to the Denver & Rio Grande in other matters which are vital to both roads:

1. Is the Western Pacific to be sold, subject to those provisions of Contract "B," which make it, so far as traffic is concerned, a mere extension of the Denver & Rio Grande? When the receivers, or the referee, or the special master offer it for sale from the auction block, that is the first thing a prospective bidder will inquire about. On the one hand, it is likely that the Union Pacific, or the Chicago & Northwestern, or the Burlington, might hesitate to bid for a property which was bound to deliver all its traffic to the Denver. On the other hand, an independent bidder might hesitate to buy a road which ends at Salt Lake, and with no traffic arrangements to the East. So that the decree *nisi*

in directing a sale, must direct whether or not the property is to be sold, subject to Contract "B," or freed from it—and the Denver is a necessary party to the determination of that question.

2. In the same manner, the Western Pacific, by Contract "C," is tied up to the Missouri Pacific, through the Denver & Rio Grande. The parties to Contract "C" are the Missouri Pacific and the Denver & Rio Grande. It provides that the two parties shall deliver, each to the other, all traffic originating on the roads; and in addition, the Denver agrees to deliver to the Missouri Pacific, all traffic originating on the Western Pacific.

This contract further provides:

> And whereas, the railway line of said Pacific Company hereinbefore mentioned will, when completed from San Francisco to Salt Lake City, furnish a new outlet to the Pacific Coast for west-bound traffic carried by the parties to this agreement, and said Pacific Company will then be in a position to make substantial contributions of east-bound traffic for the said joint through line hereinabove provided for; and,
>
> Whereas, the Pacific Company has entered into a traffic agreement with the Denver Company and the Western Company for the establishment and maintenance of a joint through line over their several connecting railways between San Francisco on the west and Pueblo on the east, but upon the express understand-

ing that the Missouri Company and the Denver Company shall simultaneously enter into this agreement; and,

Whereas, the Pacific Company, for the purpose of raising capital wherewith to complete and equip its said railway, has authorized an issue of Fifty Million Dollars of its First Mortgage Five Per Cent. Thirty-year Gold Bonds, and has secured the same by Mortgage to Bowling Green Trust Company, Trustee, the same bearing date Sept. 1st, 1903; and,

Whereas, the establishment and the continued and effective maintenance of the traffic relations established by this agreement between the Missouri Company and the Denver Company, parties hereto, are of substantial benefit and advantage to the Pacific Company by resaon of the railway connection as aforesaid at Salt Lake City and by reason of the traffic agreement aforesaid between the Denver Company and the Western Company on the one hand, and the Pacific Company on the other; and,

Whereas, the establishment and the continued and effective maintenance of the traffic relations established by said hereinbefore recited agreement between the Denver Company and the Western Company on the one hand and the Pacific Company on the other hand, are of substantial benefit and advantage to the Missouri Company by reason of the furnishing of additional business for the joint line of the

Denver Company and the Missouri Company created by this agreement;

Now, therefore, in further consideration of the premises and of the mutual covenants and agreements herein set forth, it is hereby further covenanted and agreed by and between the parties to this agreement, to wit, the Missouri Company and the Denver Company, as follows:

1. This contract is made not only for the mutual benefit of the parties hereto, but also for the benefit of Western Pacific Railway Company, being the Pacific Company aforesaid.

2. The Pacific Company having a beneficial interest in this contract and in the continuance of operations thereunder, said Company, and its successors and assigns, shall have the right to enforce specific performance of this agreement and of each and every part thereof (whatsoever the nature of any provision thereof may be), for and during the entire term hereinafter provided.

3. The said traffic contract between the Denver Company and the Western Company of the one part, and the Pacific Company of the other part, and the continuance of operations thereunder being of substantial benefit and advantage to the Missouri Company, said Missouri Company and its successors and assigns shall have the right to enforce specific performance of said agreement and of each

and every part thereof for and during the entire term thereof; but nothing in this section contained shall be taken to authorize any action that shall have the effect of impairing in any manner or to any extent the lien or security of said First Mortgage of the Pacific Company or of preventing, obstructing or interfering with the exercise of any of the remedies thereby granted to the Trustee, or to prevent the modification or termination of said traffic contract in the manner therein provided therefor or to impair or qualify the right of the Denver Company to enter into any agreement, in its own absolute discretion, abrogating, or modifying any provision or provisions thereof in accordance with the provisions in that behalf therein contained.

4. All of the rights of the Pacific Company under this agreement may by said Pacific Company, be effectively pledged by assignment thereof to Bowling Green Trust Company, Trustee, under the first mortgage of the Pacific Company.

5. The Trustee for the time being under the said first mortgage of the Pacific Company, at all times, both prior to and after default under said mortgage, shall have the right to enforce specific performance of this agreement, and each and every part thereof, by each and both of the parties thereto, and to enforce this agreement by suits in equity or actions at law

or otherwise as it may deem appropriate from time to time.

6. This contract shall be and continue in full force and effect from the date of executing the same and until all of the Fifty Million Dollars of First Mortgage Five Per Cent. Thirty-year Gold Bonds of the Pacific Company, principal and interest, shall be fully paid, or until said bonds shall be called for redemption and provision made for payment thereof in full, principal and interest, as provided in the First Mortgage of said Pacific Company, and this said contract shall run with the railways of each and both of the parties hereto and shall accrue to the benefit of and be binding upon them and their respective successors and assigns.

It will be remembered, that this contract was one of those referred to in the preliminary agreement between the Denver and the Western Pacific, and was specifically pledged under the First Mortgage. So that, if and when the road is sold, the interlocutory decree must determine whether it is to be delivered free from Contract "C," or bound by it. And in the determination of *that* question, both the Denver and the Missouri Pacific are necessary parties.

3. By the provisions of Contract "A," the Denver agrees by the purchase of second mortgage bonds, to furnish the money necessary to complete and equip the Western Pacific. So far as the com-

pletion of the road is concerned, this contract was carried out. But it was certainly never carried out as to equipment. The schedule attached to, and made a part of Contract "A," reads:

Equipment:

"This will consist of locomotives of different classes, modern design and best construction. Also cars of various classes and modern design for passenger train service, and cars of various classes and suitable design for freight service, the aggregate cost of the Equipment being not less than $3,000,000."

But the Western Pacific owns no passenger cars at all, and practically no freight equipment. It is supplied with both passenger and freight cars by the Denver, under leases, by which the Western Pacific pays large rentals. Now, Contract "A" is also pledged under the First Mortgage; it is an asset in the hands of the receivers; and there is a grave question, as to whether or not the Denver is not compellable to provide both passenger and freight cars; or at least, an involved accounting is necessary of the proceeds of the Second Mortgage bonds—and again the Denver is a necessary party.

(See Report of Receivers' Exs. "H," "I" and "J.")

4. The freight terminals used by the Western Pacific in Salt Lake, are the property of the Denver & Rio Grande. These terminals are held un-

der a lease, which is to run as long as the First Mortgage bonds are unpaid. This lease is also pledged to the Trustee under the First Mortgage. Again, if the property is to be sold, it is necessary to determine whether it is to be sold subject to this lease, and the Denver is a necessary party to the determination of that question.

(See Receivers' Report, Exhibit "G.")

5. The passenger terminals in Salt Lake City belong to a separate corporation, the Salt Lake City Union Depot and Railroad Company. They consist of an imposing and convenient union depot, and extensive and commodious yards. The stock of this corporation is owned by the Western Pacific and the Denver, the latter owning one share more than the former. This Depot Company has an outstanding bond issue, of which the Bankers' Trust Co. is trustee. There is a contract between the Denver and the Western Pacific, by which each pays one-half the interest on the bonds, as well as other expenses. This agreement is pledged under the Deed of Trust of the Depot Company, and the Denver and the Western Pacific; each guarantee one-half of the interest on its bonds.

(See Receivers' Report, Exhibits "K" to "P.")

So that, under these arrangements, it must be determined: (a), whether or not the property of the Western Pacific is to be sold subject to this lease; (b), how far the Western Pacific's guaranty of the bonds or the Depot Company is a lien on its property; (c), the rank of that lien, if it exists, *and the*

highly important and interesting questions as to whether or not this guaranty of one-half of the interest on the Depot Company's bonds takes precedence over the lien of the Western Pacific's First Mortgage; and whether or not the Denver is not bound by Contract "B" to pay this, as a necessary operating expense.

In any event, it makes the Denver, again, a necessary party.

6. In February, 1910, another contract was entered into between the Denver and the Western Pacific. It reiterates Contracts "A" and "B," and agrees to continue to supply sufficient money to fully carry out the provisions of those documents. This latter contract, however, recognizes that inasmuch as the capital stock of the Western Pacific is only $75,000,000.00, that it cannot lawfully create any indebtedness above that amount. However, it was already indebted $50,000,000.00 on the First Mortgage Bonds, and $25,000,000.00 on the Second Mortgage. Accordingly, by this contract, it was agreed that moneys advanced by the Denver should not constitute a "present indebtedness," but should only become a debt when the capital stock should be increased.

(See Receivers' Report, Exhibit "Q.")

Now, the effect of this agreement upon the Western Pacific, is also of great importance from two points of view:

1. It reiterates the covenant to make up all sums necessary under both Contracts "A" and "B";

2. It postpones any claim for sums so advanced, until the Western Pacific can lawfully create the indebtedness.

Under Contract "A," the Denver agreed to purchase the entire issue of $25,000,000.00 Second Mortgage bonds at 75, in order to provide money for the completion and equipment of the road. In order to consummate this transaction (as well as to raise other moneys), the Denver created its First and Refunding Mortgage, as security for an authorized issue of $150,000,000.00 Five per cent. bonds. Then in August of the same year (1908), the Denver and the Western Pacific made an agreement with the Bowling Green Trust Company by which $10,863,000 of the Western Pacific's Second Mortgage Bonds were pledged as security for the Denver's First and Refunding Bonds; this transaction, as this latter agreement shows, was in furtherance of a contract between the Denver and three New York banking firms, Blair & Co., Solomon & Co., and Read & Co., by which the bankers purchased the Denver's convertible notes in the sum of $10,000,000 and took as security $15,000,000.00 of the Denver's First and Refunding Bonds. The money realized from these notes was largely used by the Denver in the purchase of Western Pacific Second Mortgage Bonds. Section 7 of this

contract specifically recognizes the existence of Contract "B".

(See Report of Receivers, Exhibit "R.")

In July, 1909, the Denver and the Western Pacific entered into a further contract with the Equitable Trust Company. This contract recites that *by its very terms* the Denver's First and Refunding Mortgage provides that $23,000,000.00 of the bonds secured by it may be used to purchase Western Pacific bonds in accordance with Contract "A". This agreement provides that $6,100,000.00 further Western Pacific Second Bonds shall be deposited with the Trustee of the Denver's First and Refunding Mortgage.

(See Report of Receivers, Exhibit "S.")

Then, in May, 1912, the Denver created its Adjustment Mortgage, as security for an authorized issue of $25,000,000 seven per cent bonds. This mortgage, by its terms, recognizes the liability of the Denver under Contract "B".

It would seem then, that purchasers of the Denver's First and Refunding Fives and its Adjustment Sevens, had ample notice of its obligations to the Western Pacific; to the determination of that vital question, affecting the ranks of the lien of Contract "B", the Denver is also a necessary party.

One of the vital questions concerning Contract B is whether or not it constitutes an equitable mortgage on the properties of the Denver and Rio Grande. If it does, then, unquestionably, the first

mortgage is a mortgage upon two distinct units of property: (1) The railroads and property of the Western Pacific, and (2) the railroads and property of the Denver and Rio Grande.

If this is true, then it is elementary that under the law of California, a decree foreclosing a lien as to one of those units would extinguish the lien as to the other, but the question as to whether as a matter of law it does constitute a lien upon the properties of the Denver is not the real question involved in these proceedings, in this: that the District Court at its peril must determine whether or not it does so constitute a lien, for the reason that if it does, then that lien wil be extinguished. It is clear, therefore, that the question whether or not it does constitute a lien cannot be determined without the presence of the Denver and Rio Grande.

Furthermore, the Denver is a necessary party from still another point of view. Subsequent to the execution and pledging of Contract B, the Denver executed a mortgage known as the adjustment mortgage, upon which was issued ten million dollars' worth of bonds. That adjustment mortgage contains a specific provision that the obligations of the Denver under Contract B shall be subordinate to the adjustment bonds.

In other words, the Denver and Rio Grande, after it had executed Contract B, which in terms was a lien on its railroad, creates another lien upon its railroad, which lien provides that it shall be superior to the former lien of Contract B. In mar-

shaling the assets, it is necessary for the District Court here to determine the effect of this provision. In other words, the District Court must marshal the liens and establish their priority. The claim of the Denver and the Trustee under its adjustment mortgage, that it has a prior lien over Contract B is a claim which cannot be adjudicated without the presence of both the Denver and its Trustee. During the oral argument, the solicitor for the plaintiff conceded as follows:

> "Your Honor asked me at the last argument whether I didn't think this court had jurisdiction over the operating part of Contract B. I said that I thought it had. I am no less firmly convinced now than I was then that it has. I don't think that the Trustee has any power and I think if it seeks to exercise the power this court would restrain it from interfering with the balance of Contract B, that is the operating agreement, or the covenants with the Western Pacific Company itself, unless it shall do so through this court, because this court has that part of that contract in its possession and under its control and I think should exercise that control itself."

But under the terms of Contract B the Denver and Rio Grande has several rights directly affecting the property:

(A) The right to force the Western Pacific to deliver to the Denver all of its traffic;

(B) The right to compel the use of the main line of the Western Pacific for one through passenger train a day;

(C) The right to compel the Western Pacific to apply all of its net earnings to interest and sinking fund. It is true, that as to the purely traffic arrangements, the Trustee is granted the right by Contract B and the deed of trust to abrogate these provisions. It is equally true that it has not done so. It is likewise equally true that the District Court has the right and it is its duty to determine those provisions of the deed of trust the same as any other provisions, and the Denver is a necessary party to any such attempted determination. It is likewise true, that neither Contract B nor the deed of trust give any power to the Trustee to abrogate that portion of Contract B by which the Western Pacific agrees to use all of its net earnings for interest and sinking fund, and it is absolutely necessary for the District Court in its decree to determine whether or not the property will be sold freed from that burden or subject to it, and the Denver is certainly an interested party in the determination of that question.

Furthermore, the Denver is a party also to Contract C. Mr. Bowie in his argument, page 287 of the record, states:

> "Contract C has been violated constantly by all parties concerned in it ever since it was made. Nobody has ever lived up to the provisions of Contract C. They have been utterly disregarded or thoroughly violated."

Mr. Krech, president of the plaintiff and chairman of the Reorganization of the Committee, on page 20 of exhibit 21, attached to the petition for the

writ of prohibition, states that in his opinion, Contract B established two sets of rights and choses in action; one in favor of, and enforcible by the Western Pacific Company, and another in favor of and enforcible by the Trustee under said Western Pacific Company's first mortgage for the benefit of the holders of the bonds secured thereby; that the Western Pacific Company's rights are pledged under said first mortgage as security for the payment of its said first mortgage bonds.

Admittedly, then, the right of the Western Pacific to demand from the Denver moneys sufficient, not only to make up deficiencies in sinking fund, but also in operating expenses, and all other moneys necessary to insure the continued operation of the road and to retain unimpaired the lien of the first mortgage, was the right of the Western Pacific pledged under its first mortgage, and has been placed in the custody of the receivers.

Admittedly, also, the right to compel the Denver and Rio Grande to turn over all traffic to the Western Pacific was pledged under the first mortgage, and is the subject of foreclosure.

Therefore, when the court comes to frame a decree, it must define the extent—

(1) To which the Western Pacific can compel the Denver to make up deficiencies;

(2) The right to compel the Denver to turn over to the Western Pacific all of its traffic.

And here, again, it is apparent that the Denver and Rio Grande has an interest in the determination of these questions.

It appears from the record, the affidavits and from the ancillary and dependent bill filed in New York, that large sums have been diverted by the Western Pacific and applied to improvements and capital expenditure. Upon its face, this was a very evident violation on the part of the Western Pacific of its contract with the Denver and Rio Grande. It may be, of course, that it will be shown, when the time comes, that these diversions were sanctioned and acquiesced in by the Denver and Rio Grande, for the reason that it appears that the Denver and Rio Grande was the owner of almost all of the stock of the Western Pacific and in complete control of its board of directors. However that may be, it is apparent that the Denver and Rio Grande has a direct interest in the very physical properties of the Western Pacific. Were it not for such acquiescence it might be argued that this money which had been invested in actual physical properties and had thereby gone to increase the security of the bondholders, was a credit to come out of the corpus for the Denver and Rio Grande, or, at least, to reduce its liability. This is distinctly recognized in the dependent bill filed in New York. However that may be, it is evident that the Denver and Rio Grande is a party interested in the question as to whether or not it should be allowed this credit in the sale of the physical properties of the

Western Pacific. Counsel for the Bondholders Committee, on the oral argument said:

> "The Denver Company has, during the entire existence of this contract, paid to the Trustee, not the difference between the gross earnings of the Western Pacific and the money which was necessary, plus gross earnings, to make up these sums, but the difference between the sum actually paid into the Trustee by the Western Pacific, and the sum actually necessary to make up the interest."

There can be no question that the amount of the Denver's future liability is dependent upon the amount realized from the sale of the physical properties. The Denver is, therefore, directly interested in another question, namely, the question of the upset price and the terms of the sale. In other words, if the property should sell for fifty million dollars, the Denver would not have to pay a cent. If it should sell for only ten million dollars, the Denver's liability would be on the remaining forty million. The Denver is, therefore, directly interested in the question as to what the upset price should be.

Dated, San Francisco,
March 15, 1916.

Respectfully submitted,

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Attorneys for Respondent.